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DIGEST OF CASES⁽¹⁾*Relating to Railway Traffic, and the Rating of Railways,
decided in the Superior Courts of Law.*

CLOAK ROOM.]—A railway company issued a cloak-room ticket, which bore upon it the following condition: "The railway company will not be responsible for articles left by passengers at the station, unless the same be duly registered . . . and they will not be responsible for any package exceeding the value of 10l." :—*Held*, that this condition absolved the railway company from liability for any damage or injury to an article which exceeded the value of 10l.; such an article being received at the risk of the owner and not at that of the company. *Pratt v. South Eastern Ry. Co.*, [1897] 1 Q. B. 718; 66 L. J. Q. B. 418; 76 L. T. 465; 45 W. R. 503.

GOODS TRAFFIC.]—1. The Lancashire and Yorkshire railway company received goods from a merchant at Manchester, to be carried, for the plaintiff, under a through-booking contract, and to be delivered to him at Limerick. The goods were delivered to the plaintiff at Limerick, but had been injured *en route*, and there was nothing to show on what part of the journey the injury had occurred. The various railway companies concerned in the carriage had an arrangement between themselves by which the freight was to be collected from the consignee by the defendants, and then was divisible amongst them in proportion to the mileage. The plaintiff claimed damages from the defendants for breach of contract to carry from Manchester to Limerick:—*Held*, that as there was no evidence that the Lancashire and Yorkshire railway company had made the through-booking contract as agents of the defendants, therefore the defendants were not liable in the absence of proof that the injury had been done on their line. *Tuohy v. Great Southern and Western Ry. Co.* [1898], 2 Ir. R. 789.

2. A railway company which accepts goods for carriage by a named route is liable to the consignor in damages for loss occasioned to him owing to the goods being carried by a different route. By the consignment note, a railway company were exempted from liability for loss, damage, misdelivery, delay or detention of the goods, except upon proof that such loss, &c. arose from wilful misconduct on the part of their servants. The consignor incurred loss owing to the goods being carried by a different route:—*Held*, that the railway company were liable for the loss occasioned; and that the clause in the consignment note had no application. *Mallett v. Great Eastern Ry. Co.*, [1899] 1 Q. B. 303; 68 L. J. Q. B. 256; 80 L. T. 63; 47 W. R. 334.

(¹) This Digest is in continuation of the Digests in Vols. I.—IX.

3. The plaintiffs suffered loss from goods, which they had forwarded by the defendant company's line, arriving too late for the market, and they sued for the loss incurred. The jury found, in answer to questions left to them by the judge, that the defendants had accepted the goods with the knowledge that they were to be sold in particular markets, but that they had not been guilty of negligence. The consignment note contained the following condition: "The company will not be liable for any loss of market":—*Held*, that this condition would have been unreasonable had section 7 of the Railway and Canal Traffic Act, 1854, been applicable; but that as the jury had negatived negligence, the defendants were not within this section, and consequently, at common law, the condition was good as notice to the consignor. *Duckham v. Great Western Ry. Co.*, 80 L. T. 774.

JURISDICTION.]—See *Sidings*.

LEVEL CROSSING.]—1. Section 6 of the Railways Clauses Act, 1863, enacts that "for the greater convenience and security of the public, the (railway) company shall erect and permanently maintain a lodge at the point where the railway crosses on the level the turnpike road or public carriage road," and that failure to do so subjects them to a penalty:—*Held*, that this section applies to any turnpike road or public carriage road, and not merely to such similar roads as are specifically mentioned in the special Act authorising the construction of the particular railway. *Query*.—Whether such roads, when marked for level crossings on the statutory plan deposited under the special Act, are not turnpike or public carriage roads "authorised by the special Act" for level crossings within the meaning of section 5 of the Railways Clauses Act, 1863. *Reg. v. Longe*, 66 L. J. Q. B. 278.

2. A railway company made a level crossing over their line where it intersected ordinary farm lands, in accordance with section 68 of the Railways Clauses Consolidation Act, 1846. The crossing was rarely used, and then only for farming purposes. Many years after the landowner opened a quarry, and sought to use a traction engine and wagons for drawing the stones over the railway. Evidence was given that the crossing was unsuitable for a traction engine, and that the contemplated user would involve danger to passing trains:—*Held*, that the landowner was not entitled to use the crossing in the manner contemplated, and should be restrained by injunction from so doing. *Great Northern Ry. Co. v. McAlister* [1897], 1 Ir. R. 587.

PARCEL POST.]—Sub-section 2 of section 3 of the Post Office (Parcels) Act, 1882, enacts: "Every railway company shall afford all reasonable facilities for the receipt and delivery of . . . the receptacles containing the parcels at any of their stations . . . and shall perform the service of transferring such . . . receptacles to and from the vehicles of the Postmaster-General at the outwards and inwards railway stations":—*Held*, the same station may be both an "outwards" and an "inwards" station in relation to a postal parcel received at one station for sorting purposes, and forwarded again from the same station to its ultimate destination; and *further*, that the railway company are bound, under the Post Office (Parcels) Act, 1882, to accept such a parcel wherever it is tendered and to deliver it wherever it is applied for, without reference to its ultimate destination. *Reg. v. London and North-Western Ry. Co. and Great Western Ry. Co.*, 66 L. J. Q. B. 516; 74 L. T. 624.

PASSENGER DUTY.—By sub-section 1 of section 2 of the Cheap Trains Act, 1883, it is enacted that fares not exceeding the rate of one penny a mile shall be exempted from passenger duty. The Furness Railway charged less than one penny per mile for third-class tickets, but they issued to holders of third-class tickets for an extra charge "supplementary reserved" tickets, entitling the holders thereof to reserved accommodation in certain third-class compartments having labels in the windows bearing the words "Reserved tickets":—*Held*, that where the total sum received by the railway company from a person holding a third-class ticket and a supplementary reserved ticket exceeded a penny a mile, they were liable to pay duty upon it. *Attorney-General v. Furness Ry. Co.*, [1899] 2 Q. B. 267; 68 L. J. Q. B. 623; 80 L. T. 710.

PASSENGERS' LUGGAGE.—A bicycle is not "ordinary luggage" within the meaning of the special Act of a railway company, by which every passenger travelling in a carriage of a certain class may take with him his "ordinary luggage" not exceeding a certain weight free of charge. *Britten v. Great Northern Ry. Co.*, [1899] 1 Q. B. 243; 68 L. J. Q. B. 75; 79 L. T. 640.

PASSENGER TRAFFIC.—Section 6 of the Cheap Trains Act, 1883, sub-section (c), entitles an officer of the police force to a reduced fare when travelling by railway on the public service:—*Held*, that this section does not apply to a police officer travelling by railway in performance of his duties, as an inspector of weights and measures, and who held this additional appointment under the Weights and Measures Act, 1889. *Spencer v. Lancashire and Yorkshire Ry. Co.*, [1898] 1 Q. B. 643; 67 L. J. Q. B. 465; 78 L. T. 323; 46 W. R. 443.

RATING OF RAILWAYS.—1. Lines of railway constructed within the area of a railway station for the convenience of traffic, as supplementary to the original lines passing through the station, but diverging from and rejoining them, are for rating purposes to be treated, like the original lines, as part of the railway directly contributing to the company's earnings, and are assessable on the "parochial" system, notwithstanding that such supplementary lines are used for traffic destined to or coming from goods or coal yards, or for standing and unloading goods wagons, or for running goods trains, or for the standing of engines and passenger carriages, or at times for shunting, or as bay lines into which local trains when emptied are shunted preparatory to recommencing a journey. *Stockport Union v. London and North Western Ry. Co.*, 67 L. J. Q. B. 335; 78 L. T. 180.

2. The Llandudno Improvement Act, 1854, gave a partial exemption from a general improvement rate to "the occupier of any land used only . . . as a railway":—*Held*, that the term "railway" includes not only the physical rails and the land upon which they are laid, but also those things without which the railway could not be used as a highway (such as the station platforms and the roof covering the platforms and the sidings); but that it does not include those adjuncts which are necessary merely for the convenience of passengers (such as a cab drive), the question in each case being one of degree. *London and North Western Ry. Co. v. Llandudno Improvement Commissioners*, [1897] 1 Q. B. 287; 66 L. J. Q. B. 232; 75 L. T. 659; 45 W. R. 350.

3. The Liverpool Corporation Act, 1893, section 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same . . . in any greater proportion than one fourth part of the net annual value." A railway

company occupied land in Liverpool for a goods station, which contained lines, sidings, turntables and platforms; but this station was half-a-mile distant from the company's main line, and was connected with it by a dock line belonging to the Mersey Dock and Harbour Board, who under statutory powers permitted the railway company to use such line, and by a tramway laid across the street by the railway company, under a licence granted by the corporation under statutory powers. These lines were used for the conveyance of any goods which the public might send to or from the goods station:—*Held*, that the land used for the lines, sidings, turntables and platforms inside the railway company's premises was not "land used as a railway made under the powers of an Act of Parliament for public conveyance," and that the railway company were not entitled to the partial exemption from rating contained in section 36 of the Liverpool Corporation Act, 1893. *Williams v. London and North Western Ry. Co.*, [1900] 1 Q. B. 760.

SIDINGS—PAYMENT FOR USE OF.]—1. Section 5 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, empowered them to charge for certain services, rendered to a trader at his request or for his convenience, a reasonable sum in addition to the tonnage rate. These services included "the use or occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof; and for services rendered in connection with such use or occupation." And the section further provided that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The railway company gave the defendant notice of a charge to be made as siding rent, of 6*d.* *per diem*, after the expiration of four clear days allowed for unloading; and they brought an action to recover that charge:—*Held*, that the jurisdiction of the Court to try the action was ousted, because under section 5 of the Act the arbitrator appointed by the Board of Trade was the only tribunal for the settlement of any difference arising under this section; and that the arbitrator had the determination of the whole matter, and not merely of the reasonableness of the charges. *London and North Western Ry. Co. v. Donellan*, [1898] 2 Q. B. 7; 67 L. J. Q. B. 681; 78 L. T. 575.

2. A railway company sued the defendants in the County Court for the sum of 38*l.* for siding rents for coal wagons under the same section as the last case. The defence was raised that the County Court had no jurisdiction to decide the matters in issue in the action; being ousted by the jurisdiction of the arbitrator under the section. The County Court judge found as a fact that no "difference" had arisen between the parties before the action:—*Held*, that as there had been no "difference" existing between the parties before the action was brought, that the arbitrator had not, while the Court had, jurisdiction. *London and North Western Ry. Co. and Great Western Ry. Co. v. Billington*, [1899] A. C. 79; 68 L. J. Q. B. 162; 79 L. T. 503.

3. By section 5 of the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, similar charges to those in the last two cases mentioned are authorized; and any "difference" arising thereunder is to be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party:—*Held*, that the arbitrator has jurisdiction to determine not only the reasonableness of the sum charged for the accommodation, but all questions necessarily incidental thereto, and among them the reasonableness of

the time allowed to the consignee for taking delivery of the merchandise. *Midland Ry. Co. v. Loseby*, [1899] A. C. 133; 68 L. J. Q. B. 326; 80 L. T. 93; 47 W. R. 656.

STATION.]—1. By sub-section 2 of section 17 of the London Hackney Carriage Act, 1853, a penalty is imposed upon "every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of the Act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage." A cabdriver refused to enter a railway station:—*Held*, that the cabdriver is bound to drive the fare to any place where he can gain admittance, even though such a place may be private property, as, for instance, a railway station. *Ex parte Kippins*, [1897] 1 Q. B. 1; 66 L. J. Q. B. 95; 75 L. T. 421; 45 W. R. 188.

2. A railway company having a hotel of their own within the limits of a railway station excluded from that station any servants of other hotels who wore the badges of those hotels:—*Held*, that, apart from any facilities granted by the Railway Commissioners, a railway company can exclude from their stations, or only admit to their stations on such conditions as they think fit, all persons except those using or desirous of using the railway; and *held, further*, that a member of the public unreasonably excluded from a railway station may apply to the Railway Commissioners, but has no remedy by action at law. *Perth General Station Committee v. Ross*, [1897] A. C. 479; 66 L. J. P. C. 81; 77 L. T. 226.

STATUTORY OBLIGATION CONTRAVENED WITH NO INJURY TO PUBLIC.]—Section 48 of the Railways Clauses Consolidation Act, 1845, enacts: "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour." A railway company had constructed such a level crossing under a Special Act incorporating the Railways Clauses Consolidation Act, 1845. They contravened this section, and contended that there was no proof of injury to the public by such contravention; and that the inconvenience caused to the public by reason of the existence of the crossing would be increased if they complied with it:—*Held*, that on an information filed by the Attorney-General to enforce the express terms of an enactment made by the Legislature in the public interest, the Court could not entertain the question whether injury to the public was in fact occasioned, but were bound to grant the injunction. *Attorney-General v. London and North-Western Ry. Co.*, [1900] 1 Q. B. 78; 69 L. J. Q. B. 26.

THROUGH CARRIAGE OF GOODS.]—See *Goods Traffic*, No. 1.

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DIDCOT, NEWBURY AND SOUTHAMPTON RAILWAY COMPANY

v.

GREAT WESTERN RAILWAY COMPANY AND LONDON AND SOUTH-
WESTERN RAILWAY COMPANY (1).

Through Booking—Jurisdiction of Railway Commissioners to grant without a through Rate—Reasonable Facilities—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25.

An order by the Railway Commissioners for through booking is not a matter of right. *November 5, 6,
9, 1896.*

Such an order necessarily involves an order for a through rate, although the through rate may be only the sum of the local rates of the several lines over which the traffic passes. Consequently an order for through booking can only be granted on the same considerations as would govern the granting of a through rate (*per* LORD ESHER, M.R., and RIGBY, L.J.; LOPES, L.J., dissenting).

Through booking may be granted without a through rate, not as a matter of right, but upon evidence that it is a reasonable facility within the meaning of section 2 of the Railway and Canal Traffic Act, 1854 (*per* LOPES, L.J.).

THIS was an appeal from a judgment of the Railway and Canal Commissioners' Court, which is reported in Volume ix., p. 210.

By that judgment an application made by the Didcot, Newbury and Southampton railway company for through rates for traffic to be forwarded *via* their railway between the London and South-Western stations at Southampton and Southampton

(1) Before Lord ESHER, M.R.; LOPES, L.J.; and RIGBY, L.J., sitting at the Royal Courts of Justice, London.

1896. **DIDCOT, NEW-BURY AND SOUTHAMPTON RY. CO. v. GREAT WESTERN RY. CO. AND LONDON AND SOUTH-WESTERN RY. CO.** Docks and the Great Western stations at Reading, Windsor and Paddington, and for through booking for passengers, was granted. Collins, J., and Sir Frederick Peel were of opinion that the application should be granted both as to through rates and through booking. Lord Cobham was of opinion that through rates should not be granted; but that as regards passengers, as only through booking was asked for, and as that could be claimed as of right under an amended application, he did not object to the order asked for.

The London and South-Western railway company appealed against so much of the order as had reference to through booking by passengers.

C. A. Cripps, Q.C. (Ernest Moon with him) for the London and South-Western railway company. Collins, J., has held that through booking is a matter of right, and that in this case the application for a through rate was nothing more than an application for through booking. An order for through booking cannot be made apart from an order for a through rate; for which the requirements of sub-section 5 of section 25 of the Act of 1888 must be fulfilled. One payment for a journey over several lines of railway is a "through rate," whether it is or is not less than the aggregate of the local rates.

The provisions of section 2 of the Act of 1854 as to reasonable facilities extend only to traffic on a company's own line, and do not apply to traffic over the lines of other companies.

To grant through booking where no public interest is involved, is to impose on the company against which it is granted a common law liability on the contract it is compelled to make, in respect not only of its own line, but of the whole of the route.

[They cited *Zunz v. South-Eastern Ry. Co.* ⁽¹⁾; *South-Eastern Ry. Co. v. Railway Commissioners* ⁽²⁾; *Great Western Ry. Co. v. Railway Commissioners* ⁽³⁾; *Bristol and Exeter Ry. Co. v. Collins* ⁽⁴⁾.]

⁽¹⁾ L. R. 4 Q. B. 539.

⁽²⁾ *Ante*, Vol. III. 464; 6 Q. B. D. 586; 50 L. J. Q. B. 201.

⁽³⁾ 7 Q. B. D. 182.

⁽⁴⁾ 7 H. L. 194.

Littler, Q.C., and *Acuworth* (*Balfour Broune, Q.C.*, with them) for the Didcot, Newbury and Southampton railway company. Through booking is a "reasonable facility," and may be granted under section 2 of the Act of 1854. It should be granted upon slight evidence of reasonableness. A "through rate" is a rate less than the sum of the several local rates.

[They cited *In re Barrett* ⁽¹⁾ and *Sussex County Council v. L. B. & S. C. Ry. Co.* ⁽²⁾.]

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Page appeared for the Great Western railway company.

LORD ESHER, M.R. : What happened in this case in the Commissioners' Court was, that there was an application with regard both to goods and passengers, to have it declared that there was a duty on the part of the South-Western railway company at Southampton to book goods and passengers through to Paddington station in London, and also that there should be a through rate for the goods and through fares for the passengers. The Commissioners, including Collins, J., inquired into the whole matter, and then the three Commissioners gave judgment. Sir Frederick Peel dealt with the question on the footing of whether it would be for the advantage of the public that there should be a through booking from Southampton across the line of the applicants and on to Paddington by the Great Western. He considered the same point and the same question with regard to passengers as well as with regard to goods, and he came to the conclusion that it would be for the advantage of the public that there should be a through booking and a through rate from Southampton along the South-Western railway, over the applicants' line, and along the Great Western railway to Paddington.

The question is, whether the Commissioners had jurisdiction to deal with the matter before them by considering, amongst other things, if it would be for the advantage of the public. Sir Frederick Peel did that. In my opinion he had jurisdiction to do that.

⁽¹⁾ 1 C. B. (N. S.) 423.

⁽²⁾ *Ante*, Vol. VIII. 17.

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Collins, J., went through the same process with regard to those questions as Sir Frederick Peel, and he came to the same conclusion; but Lord Cobham differed upon the facts. There were thus two judgments to one, and, the Court having jurisdiction, the matter is one with which this Court cannot interfere. But Collins, J., finding that the two Commissioners were disagreed upon the facts and upon the considerations, thought that it would be better to support the decision of the majority by deciding a question of law. Now, the question of law which he decided was, that, as a matter of law, in considering the question of through booking the Commissioners are not bound by the consideration of public convenience, or the other considerations and limitations which are contained in section 25 of the Railway and Canal Traffic Act, 1888. Collins, J., now informs us that he must not be taken as holding that he considers a decision of a former legal member of that Court as binding, but he thinks it is right for the legal member at any particular time in that Court to follow the decision in point of law of a former legal member of the Court until that decision is overruled by a superior Court. Therefore he followed the decision of Mr. Commissioner Miller in *Great Western Ry. Co. v. Secern and Wye Ry. Co.* ⁽¹⁾. That decision was, that, as a matter of law, the Commissioners can grant through booking without any of the considerations or limitations which are necessary in granting through rates. In this Court that proposition of law is open to review, and, in my opinion, it is wrong; but as the learned Judge agreed with Sir Frederick Peel on the questions of fact, that puts an end to the appeal and the judgment must stand. Collins, J., has, however, asked our opinion on the point of law, and I think that under the circumstances we should give it.

What I consider about this question of through booking is this: There may be an application to the Commissioners for a through rate, but such an application would not be made unless the rate asked for is one that is less in amount than the aggregate of the rates over the different parts of the route. The

(1) *Ante*, Vol. V. at page 184.

Commissioners may grant a through rate, but in doing so they must take into consideration public convenience and other matters. If they grant a through rate, it seems to me to follow, as a matter of necessity, that there must be a through booking. The converse seems to me to be equally true, that if a through booking is asked for, it must be taken into consideration that if it is granted it follows as a matter of necessity that there must be a grant of a rate corresponding to the booking. If the Commissioners think that a through booking is for the advantage of the public and they do not wish to interfere with the amount of the rate, it will, by the granting of the booking, be a rate payable for the through journey, which is, in ordinary language, a through rate. It will be one rate made up of the amounts of the rates over the different portions of the route. If the Commissioners consider that there should be less paid than the aggregate of the local rates, then they will grant a reduced rate, and if you choose you can call that a through rate and that only. It seems to me to be a needlessly wrong way of construing a very general and easy term in the English language. If you grant a lesser rate, then, if you like, in railway language it is a through rate; but if you leave the amount of the rates alone, and add them together and make one rate of it, then you have granted a through booking and a through rate. I think that, subject to the consideration of the conditions and limitations imposed by the statute, they can either grant that by saying they grant a through booking or by saying they grant a through rate. If they grant either one or the other they must of necessity grant both.

LOPES, L.J. : It was not necessary for the learned Judge to decide the matter of law, because it is now clear that he agreed with Sir Frederick Peel with regard to the facts, and, agreeing as to the facts, this appeal is determined. But as the learned Judge went on to deal with the law, and desires some statement by this Court on the point, I propose to say a few words on it. In my opinion, through booking is a reasonable facility, and it cannot be granted as a matter of right, or unless evidence is given which brings it within the purview of the statutes which

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allow reasonable facilities to be given. I think that Mr. Commissioner Miller did distinctly hold that the granting of through booking was a matter of right; but I am not so certain that that view was adopted by the learned Judge, because he says: "That practically, in my judgment, brings the case down to something very little more than an application for through booking, and a very slight *prima facie* case of advantage to the public, I think, would suffice on the authorities as they exist in this Court to entitle the applicants to the order which they ask for." I rather gather from that that he meant this: that, provided a certain amount of evidence is given in favour of a through booking, and that evidence is not met or rebutted on the other side, that would be sufficient to justify the Court in coming to the conclusion that it would be a reasonable facility, and that it ought to be granted.

I cannot myself think that through booking may not be granted without a through rate. In the case of passengers I can imagine cases of extreme inconvenience arising on a journey over two or more lines if a fresh ticket has to be taken at each change. If the railway companies did not act harmoniously to prevent that state of things, it would be right that an application should be made to the Commissioners to order through booking. I believe that was one of the main objects for which the Commissioners' Court was instituted. I am of opinion, therefore, that there may be a through booking without a through rate. Of course, the aggregate of the local fares would, if there had been no reduction, be paid to the first company whose line was travelled over, and paid in one sum; but I do not understand that is what is generally called a through fare or rate. I cannot understand traders or other persons asking for a rate of that kind. If they have obtained through booking, it follows, as a matter of course, that the rate which they have to pay would be the aggregate of those of the lines over which the passenger has to pass, and the object of an application for a through rate is to reduce the amount of that aggregate. However that may be, I am clearly of opinion that through booking may be granted by itself, without a through rate, and I think a through booking is a reasonable

facility in the way which is described by Wills, J., in *Sussex County Council v. London, Brighton & South Coast Ry. Co.* ⁽¹⁾: "I will explain presently in a few words how, in our opinion, that requirement can be satisfied under the circumstances of this case. We think that through booking, which is a small matter comparatively, but which is yet a great convenience, ought to be included amongst the reasonable facilities, but, except in one particular about to be mentioned, our order is not intended to have any further operation." I think in the result it is perfectly clear that the decision of the majority of the Commissioners must stand, as they agreed on the facts, and therefore the question of law becomes immaterial.

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RIGBY, L.J.: Agreeing as I do with the Master of the Rolls in the judgment he has delivered, I shall only say a few words on the point of law that has been raised.

I am unable to see how there can be a through booking without a through rate, or how a rate can be granted as a through rate without its being necessary to include also a through booking. I am quite ready to agree, and no doubt it is the fact, that railway managers and others when they are talking about through rates very generally mean reduced rates; but that there can be a legal meaning of that word that it shall only mean a through rate when it is less than the sum of the local rates, I certainly have not heard anything to induce me to believe. When a man takes his ticket or pays the price demanded for the carriage of goods from one place to another, assuming them to be carried on different lines, he pays one sum. He probably knows nothing at all about the different way in which that sum may have to be divided. That may be a matter of arrangement between the companies, or it may be a matter of an order from the Railway Commissioners. As to the amount he pays he only knows this, that he is entitled for that one payment to have himself or his goods, as the case may be, carried over the whole distance. He has paid for through carriage, and I should suppose that he and everyone else con-

(1) *Ante*, Vol. VIII. at page 27.

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cerned would consider that as a through rate, whether it was the sum of the local rates or a smaller sum. I think it follows that through booking would only be granted upon considerations that would authorize the granting of a through rate. I agree that the decision of the majority of the Commissioners on the facts must stand.

[Solicitors for the London and South-Western railway company: *Bircham & Co.*

Solicitor for the Great Western railway company: *R. R. Nelson.*

Solicitors for the Didcot, Newbury and Southampton railway company: *Lake & Lake.*]

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v.

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Through Booking—Through Rates—Grouping London Stations—Termini a quo and ad quem the same—Competitive Company not Grouping—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25.

Under section 2 of the Railway and Canal Traffic Act, 1854, the Railway Commissioners have power (upon proof that it is reasonable and in the interests of the public) to order through booking of both passengers and goods at the sum of the local rates charged on the two lines of railway constituting the through route (*per* COLLINS, J.).

*April 6, 7, 8,
9, 10, 12,
May 20, 1897.*

If the demand for such through booking is made *bonâ fide* by a member of the public, and *a fortiori* by a community, there is *ipso facto* a strong *prima facie* case of reasonableness and public interest (*per* COLLINS, J.).

In applications under section 25 of the Railway and Canal Traffic Act, 1888, the Commissioners require evidence of public interest and reasonableness in favour of the proposed through rate and route adequate to outweigh the interference with the vested legal rights of railway companies.

The Didcot railway company applied for through rates *via* their railway for traffic between Southampton and the Great Western company's stations in London at Poplar and Smithfield. The proposed route was that by which the Commissioners had already allowed through rates for traffic between Southampton and the Great Western station at Paddington (see *ante*, Vol. ix., p. 210).

The difference between that case and the present one was that in the former case traffic coming to Paddington could only be offered to the Great Western company, whereas traffic coming to Poplar or Smithfield might also be offered to the South-Western company, for that railway company equally with the Great Western company received and delivered traffic at both of those places.

Poplar traffic for either the South-Western railway or the Great Western railway passed over the North London railway, and for haulage between Poplar and Acton (Great Western) and Poplar and Kew Bridge (South-Western) each railway company paid a toll of 3s. 3d. a ton. To provide for this payment the

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PERK and Viscount COBBAM sitting at the Royal Courts of Justice, London.

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South-Western company's rates by rail from Poplar to Southampton were higher than from Nine Elms. The Didcot company proposed that the through rates from Poplar to Southampton *via* the Great Western and Didcot railways should be the same as were charged from Paddington, on the ground that the Great Western had made their local rates from Paddington applicable to Poplar, Smithfield, and their other London stations.

Smithfield traffic for the Great Western company was carried by that company over the Metropolitan railway under running powers at a cost of 10*d.* a ton for the use of the line. The South-Western company had a receiving office at Smithfield, and carted all their traffic to and from Nine Elms. The Didcot company proposed that the through rates from Smithfield as compared with those from Paddington should be 10*d.* more for Classes A. and B. and for certain articles carried at special rates, and for all other traffic should be of the same amount.

The applicants' proposal was not only to convey traffic to and from Paddington by a route belonging to three different railway companies and sixteen miles longer than the South-Western route, at the Nine Elms rates (which were admittedly low on account of sea competition), but to carry the traffic to and from Smithfield and Poplar four and ten miles further respectively at the same rates.

Held, that the through rates for traffic from Poplar to Southampton *via* the Great Western and Didcot railways should be of the same amount as the existing South-Western rates between those places.

And that the through rates for traffic from Smithfield to Southampton *via* the Great Western and Didcot railways should be of the same amount as the rates from Paddington, plus the cost of the conveyance of the traffic between Smithfield and Paddington.

THIS was an application by the Didcot, Newbury and Southampton railway company, to whom through rates and through booking had been granted by the Railway Commissioners from Southampton to Paddington station in London by way of Shawford and Newbury Junctions, and *vice versa* ⁽¹⁾, that these same rates should (with a few exceptions) apply from or to the Great Western railway company's stations or depôts at Kensington, Chelsea Basin, Smithfield, Poplar and Brentford, to or from the London and South-Western railway company's stations or depôts at Southampton, namely, Southampton West, Southampton Town and Docks, Southampton Town Quay and Southampton Docks. And further, that passengers and passenger train traffic should be carried by such route at through rates from or to the Paddington station of the Great Western railway company to or from the Shawford,

(1) *Ante*, Vol. IX. 210.

Eastleigh, Swaythling, St. Denys, Northam, and Southampton West stations of the London and South-Western railway company (such stations, with the exception of Southampton West, being intermediate stations between Shawford Junction and Southampton). The application was also to extend the rates in the previous application to goods other than those mentioned in the order for which there were in existence through rates on the London and South-Western railway.

It appeared that Smithfield and Poplar were four and ten miles respectively further than Paddington, that the South-Western company had a depôt at Smithfield from which they carted to Nine Elms, and that they were in exactly the same position at Poplar as the Great Western company. It also appeared that the South-Western company's rates by the competing route applied only to Nine Elms (to which station they were admittedly low, owing to sea carriage competition), and that their rates to Poplar and Smithfield were higher owing to the increased cost of carriage to those places.

Kensington and Chelsea Basin stations were proved to be principally adapted for mineral traffic (a very small quantity of which would be sent to Southampton), and to be adequately served by the South-Western company.

At Brentford the Great Western railway company had the advantage of a station at the riverside; while traffic coming from barges would have to be carted to the South-Western company's station. The South-Western railway company proved that their Southampton West station was on a different branch or line to their Southampton Town station, and that very little goods traffic was dealt with there, it being chiefly a passenger station.

Littler, Q.C., H. D. Greene, Q.C. (Acworth with them), for the applicants.

The rates having been granted to Paddington, the only question is, whether it is reasonable to have rates to these other stations. From Winchester the rates are grouped for all these London stations. Why should they not be grouped from Southampton, twelve miles further on? This is not an appli-

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cation to fix a group rate ; but, the group rate being in existence, to apply it to certain traffic.

They quoted Sir Frederick Peel's judgment in the *Severn and Wye Case* ⁽¹⁾.

Cripps, Q.C., Asquith, Q.C. (Ernest Moon and Lord Robert Cecil with them), appeared for the London and South-Western railway company.

In *Zunz v. South-Eastern Ry. Co.* ⁽²⁾, Cockburn, C.J., states clearly that the Railway and Canal Traffic Act of 1854 applies only to a company's own system. The "reasonable facilities" under this Act do not come into force until the relationship of carrier and consignor or consignee has arisen. The "due and reasonable facilities" to be afforded to a "continuous line" under section 2 of the same Act are physical facilities (*e.g.*, timing of trains). Through booking was given in 1873 for the first time.

In the case of Smithfield, Poplar, &c. (as opposed to Paddington), both the *terminus a quo* and the *terminus ad quem* on the existing and on the proposed route are the same.

Both the Great Western and the South-Western have to pay a substantial sum to the North London railway for carriage to Poplar. The Great Western have to pay the Metropolitan to reach Smithfield, and the South-Western have to pay cartage.

The Great Western are entitled to group Paddington and Smithfield as far as their own system is concerned, but not where it runs down a rate properly charged by the South-Western, and of which there is no complaint.

The Didcot company are not entitled to a lower rate for a worse route for the purpose of the diversion of traffic—this is not "just and reasonable"—under the Railway and Canal Traffic Act, 1888, s. 25, sub-s. 5.

There is a *prima facie* presumption against granting the application. First, it is a longer route, with twenty-four miles single line ; secondly, the South-Western railway company are

⁽¹⁾ *Ante*, Vol. V. 170.

⁽²⁾ L. R. 4 Q. B. 539.

at both ends of the route proposed ; thirdly, the traffic to Paddington since through rates were granted has been infinitesimal ; and lastly, there is no evidence that the present South-Western rates are unreasonable. Such rates are kept down by water competition.

The Court, by their judgment, held that the rates as regards Poplar and Brentford must not be lower in amount than those which were in force by the London and South-Western railway company's route, and that as regards Brentford the rates should be for barged or imported traffic only :

That no rate would be sanctioned to or from Smithfield which did not take adequately into account the difference in the cost of carriage between Paddington and Smithfield :

That it would be of no public advantage to grant a through rate between Southampton and Kensington or Chelsea Basin :

That, as regards the Southampton West station, the South-Western railway should not be required to deal there with classes of traffic *via* the through route, which for want of space, or suitable accommodation, they did not deal with *via* their own route :

It was further held, that through bookings should be granted by passenger trains between Paddington and the South-Western company's stations at Shawford, Eastleigh, Swaythling, St. Denys, Northam and Southampton West, subject to the applicant company taking the responsibility for any inconvenience as to train connections arising with regard to trains from Southampton West.

The judgments of the Commissioners were as follows :—

COLLINS, J. : I agree in the conclusion about to be read by Sir Frederick Peel, but in view of the argument which was addressed to us by the learned counsel for the South-Western railway company I desire to state shortly what I regard to be the principles by reference to which the right to through rates must be decided.

The Traffic Act of 1854 provided by section 2 : " That every railway company, canal company and railway and canal company shall, according to their respective powers, afford all

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reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." This section was held by the Commissioners to give them jurisdiction to order through booking of both passengers and goods: see *Innes v. London, Brighton and South Coast Ry. Co.* ⁽¹⁾, and *Uckfield v. South Eastern Ry. Co.* ⁽²⁾. As the section gave no power to compel either company to take any sum less than it was actually charging within its maximum the through booking so ordered was necessarily at the sum of the local rates on the two lines constituting the through route. The Act of 1873, followed by the Act of 1888, gave power to order a through rate, and in connection therewith to compel the com-

⁽¹⁾ *Ante*, Vol. II. 155.

⁽²⁾ *Ante*, Vol. II. 214.

panies to be satisfied with less than their local rates. Under the powers so extended, it became customary in railway parlance to describe orders which merely enjoined that the goods or passengers should be carried over two or more lines at one booking without interfering with the rates as "orders for through booking," while those that dealt with the rates as well were called "orders for through rates." It was quite true that in both cases a through rate was ordered, inasmuch as there was only one sum paid at a single booking in both cases, but in the latter case the amount of rate was fixed by the Commissioners, in the former it was fixed automatically by the addition of two local rates. It is worth while to observe that the method by which, in 1873, the Legislature conferred this jurisdiction upon the Commissioners was by first enacting that the facilities contained in section 2 of the Act of 1854 should include the due and reasonable receiving, forwarding and delivering by every railway company of through traffic at through rates or fares, and then proceeding to provide the conditions under which the jurisdiction should be exercised. It seems clear to me that section 2 of the Act of 1854 did, by its terms which I have read, confer upon the Commissioners the jurisdiction which they asserted to order through booking, but it is equally clear that it could only be ordered if it was reasonable in the interests of the public. The railways are to afford reasonable facilities, "so that no obstructions may be offered to the public desirous of using such railways," and "so that all reasonable accommodation be at all times afforded to the public." Now the conditions imposed upon the exercise of the enlarged jurisdiction conferred by the present Act, namely, by section 25 of the Act of 1888, are (sub-section 5): "The Commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners just and reasonable." Reasonableness, therefore, and the interest of the public, are the tests by which the demand must be tried in both cases. The Court of Appeal,

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in their judgment in this case, have held that "through booking," in the sense in which I have used it, could only be granted in view of the consideration which I have just named as governing through rates. I do not understand the Court as holding that the Commissioners had no power under the Railway Traffic Act, 1854, to order through booking, and I have pointed out that, on the wording of the statute itself, its more limited jurisdiction could only be exercised on conditions described almost in identical language with those which govern the larger powers of the present enactment and that of 1873. No doubt language had been used by one of the Commissioners in this Court which might be thought to ignore those conditions, but, as pointed out by Lopes, L.J., a *bonâ fide* demand by members of the public, whether for themselves or their goods, to be carried over two public highways forming one continuous route at one booking, is so obviously reasonable, and for the public interest, that it might not be necessary in the case of such demand to emphasise these considerations. It is the right of every member of the public to have the freest possible use of the highways of the country, and railways are, in their origin, public highways; though the control of the means of locomotion and carriage upon them is necessarily in the hands of the companies who own them. In my opinion the owners of these highways have not even a *prima facie* right to the monopoly of any particular route. They cannot refuse to allow traffic to come on their line from another railway at any point where such railway joins theirs, and they cannot subject it to difficulties or delay in forwarding to which traffic coming over their own line to that point is not subjected. Nor have they, I think, any better claim to such monopoly, even though such traffic starts from a point which is reached by their own line as well as by that over which it has come to the common point. It must never be forgotten that the two supposed railways are simply highways meeting at a certain point, and the Legislature, in the passage from section 2 of the Act of 1854 which I have read, in terms, enacts that: "No obstruction be offered to the public desirous of using them as a continuous line of communication." Therefore, where all that is asked is, that goods or persons shall

be allowed to travel at the sum of the local rates over the continuous line formed by the two lines, if the demand is made *bonâ fide* by a member of the public, and *a fortiori* by a community, there is *ipso facto* a strong *primâ facie* case of reasonableness and public interest, with no countervailing consideration except the trouble thrown upon either railway company in obliging it to do the sum in arithmetic involved in the process of through booking and accounting. As for the liability *primâ facie* incurred by the booking company for damage happening off its own line, this can be met by conditions (see *Zunz's Case*)⁽¹⁾, or covered by the responsibility of the defaulting company in such a case, therefore there is no opposing right to the railway company except that of being spared the superfluous trouble. The trouble is not superfluous if there is a *bonâ fide* demand for the convenience, and the reasonableness and public interest are all one way. On the other hand, if the proposed rate involves compulsion upon the opposing company to accept a smaller sum than it is itself charging between the points on its own line, which now forms part of the through route, or if, the termini of the proposed through route being the same as those of an existing route, entirely in the hands of one company, a lower sum is proposed for the whole through rate than is charged by the company in possession of the existing route, other considerations arise. In the first case, to sanction the through rate involves an interference with the legal right of the opposing company to regulate its fares within its maximum. In the second case, the new rate, if sanctioned, may force the opposing company to lower its own rate to the new level, although its existing rate may be perfectly reasonable.

Now, it is clearly, in my opinion, *primâ facie* against the public interest to interfere with vested legal rights unless some compensation or equivalent is given; there must be therefore evidence of public interest and reasonableness in favour of the rate and route adequate to outweigh these countervailing considerations. So likewise, while healthy competition is in the interests of the public, unhealthy competition is not in its

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(1) L. R. 4 Q. B. 539.

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interest, and when the proposed through rate is lower than the existing single rate, this is an important consideration. It is obvious that, where the proposed through route passes over only a small part of the line belonging to the company in possession of the existing route, it might be possible to allow to it its full local rate on the part traversed out of the through rate, and yet cut down the figure of the through rate so low as to make it unremunerative, with the result that the company in possession would be forced to lower its rates to the new figures. Such a competition, which might result in the exhaustion of one of the competitors, could not in the long run be in the public interest, and this would be a factor in the question to be decided by the Commissioners. Here the reasonableness of the route as between Paddington and Southampton was decided in the last case; the difference in length, 12 to 15 miles, need not in the case of passengers represent a difference in time of more than half an hour if the two companies choose, as we are told they will choose, to work it in competition with the South-Western route. And this, for persons residing in the Paddington district, is not more than an equivalent for the time taken in going by cab or omnibus to Waterloo. In the case of goods the extra distance is of still less moment. Many instances were given in evidence, of competition successfully carried on, where the difference in distance was very much greater. The reasonableness of the route being decided, and there being proof of a large public demand for a rate, the rate proposed was the same as that which the South-Western was itself charging between the same points, and that company did not, and could not, object to the quantum of the rates or the proposed apportionment. Their objection then and now was to the introduction of a competitor into what they regarded as their territory, and the consequent possible interference with the free hand which they have heretofore enjoyed. For the reasons I have given, I think the objection has no legal foundation, and that the granting of the rate was inevitable. The route and rate between London and Southampton having been granted in that case, I should have thought that rates between the places grouped by the South-Western railway company under the Southampton rate

on the one hand, and by the Great Western railway company under Paddington on the other, would have followed as a matter of course as subsidiary and incident to the main decision. If the public are to have the benefit of the new route, it is obvious that it must not be hampered by distinctions necessitating inquiry by intending consignors as to which of the grouped stations may be used. Broadly, I think the last decision had the effect of giving the public the advantage of the Great Western route and all its London facilities to and from Southampton and all subsidiary stations. But though a rate was, I think, inevitable, it did not follow that it should be the same as that already granted to and from Paddington, and I agree in the conclusion which Sir Frederick Peel has arrived at on this point; neither do I differ in his decision as to Chelsea, though, speaking for myself, I should have included it on the principles I have stated. The Act itself clearly contemplates a through route between the same termini as an existing route; see subsection 9 of section 25 of the Act of 1888, which enacts that it shall not be lawful for the Commissioners to compel any company to accept lower mileage rates than the mileage rates which such company may, for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communications between the same points being the points of departure and arrival of the through route. The application, therefore, must be allowed, with such modifications as will be stated by Sir Frederick Peel.

SIR FREDERICK PEEL: The Didcot company apply for through rates *via* their railway for traffic between Southampton and the Great Western stations in London, at Poplar, Smithfield, Brentford, Kensington and Chelsea Basin. The proposed route is that by which through class rates, station to station, were allowed by us last year for traffic between Southampton and the Great Western station at Paddington, and though it is not as short as the South-Western route to London, and involves a working over twenty-six miles of single line, it is on the whole a reasonable and practicable route. But as regards its London end there is this difference between the Great Western stations

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in this and the former case, that traffic coming to Paddington could only be offered to the Great Western, whereas traffic coming to Poplar, or any of the other stations, may also be offered to the South-Western; for that company, equally with the Great Western, receives and delivers traffic at each of them.

Taking Poplar first, Poplar traffic for either the South-Western or the Great Western passes over the North London railway, and for haulage between Poplar and Acton (Great Western) and Poplar and Kew Bridge (South-Western) each company pays a toll of 3s. 3d. a ton. To provide for this payment the South-Western company's rates by rail from Poplar to Southampton are higher than their Nine Elms rates. The rate, for instance, for articles in Class 1 from Nine Elms is 12s. 11d., and from Poplar 15s. 9d. But the Didcot company propose that with the exception of Classes A. and B., and certain special rates, as to which they make an addition to the through rates from Paddington of about 2s. 9d. per ton, the rates Poplar to Southampton *via* the Great Western and Didcot railways should be the same as are charged from Paddington, their reason being that the Great Western have recently made their local rates from Paddington applicable under certain conditions to their other London stations.

Now the points which we have to consider and determine are whether the rates proposed are of a just and reasonable amount, and whether public interests will be served by their being granted, and on the latter point, and as to whether reasonable facilities exist for sending goods all the way by rail between Poplar and Southampton, it seems to me, upon the evidence, that the means provided for that purpose by the South-Western company by their route leave no cause of complaint, and that no real advantage would accrue to the public through having the different route proposed by the applicants. It seems to me also, on the other point, that it would not be fair to the South-Western to sanction traffic being carried by the through route at rates lower in amount than are in force by the South-Western railway. It is already carried at rates lower in proportion to distance than the South-Western rates, and it would not, I think, be expedient to make any further difference between

them; the cost of carrying from Poplar being greater than from Nine Elms, and the Nine Elms rates being admittedly low from the sea carriage competition, the South-Western may reasonably be allowed to have a higher charge from Poplar than from Nine Elms, and consequently to have also a corresponding addition made to any through rates by a competing route where there would be the same extra cost of carriage to justify it.

Smithfield, which is the next station, has railway communication with Paddington by the line of the Metropolitan company, and under an agreement made in 1868 with that company, the Great Western have, and exercise, the power of running a limited number of goods and passenger trains during the night at a cost of 10*d.* a ton for use of the line. On this account Southampton may be regarded as to some extent more accessible from Smithfield by the through route than by the line of the South-Western, who, though they have a receiving office at Smithfield, cart all their traffic to and from Nine Elms or Waterloo, and that their carting arrangements are efficient may be inferred from Mr. Owens' statement that they get the bulk of the meat traffic from Smithfield to Winchester, where the Great Western directly compete with them. Still, there are no doubt occasions when it would be convenient that facilities should exist for loading direct into railway trucks at Smithfield. But I see no reason why the convenience should not be paid for. The Metropolitan company think 10*d.* a ton a very inadequate payment at the present time for the use of their line, whatever it may have been thirty years ago, and there is besides the cost of carrying between Smithfield and Paddington. But the Didcot company propose that the through rates from Smithfield, as compared with those from Paddington, should be only 10*d.* more for Classes A. and B. and for certain articles carried at special rates, and for all other traffic should be of the same amount. This would oblige the South-Western to reduce their existing Smithfield rates to the level of the Paddington or Nine Elms rates, or, in other words, to make no charge for carting their Smithfield traffic to and from Nine Elms. The carriage over the Metropolitan line may be a less expensive service than the carting by road, but to make no charge for it, having regard

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to how that would affect the South-Western, would not be fair to that company, and I think we should decline to sanction any through rates in the fixing of which the difference in the cost between Smithfield and Paddington has not been adequately taken into account. The difference would not accord with a charge under 1s. 6d. a ton for articles in the lower classes or carried at rates specially low, and for other articles the charge should, like the company's railway rates or collecting charges by road, vary according to how the articles are classed, but before fixing the actual rates of charge for this item of cost we desire that a scale prepared on that principle should be submitted to us by the companies.

Kensington is on the West London, a line owned jointly by the London and North-Western and Great Western. Any Kensington traffic to or from South-Western stations is dealt with by the North-Western company as agents for the South-Western, and is exchanged at Kew or Clapham Junction, and the same is the case at Chelsea Basin, which is on the West London Extension line. These stations are neither of them laid out or adapted for ordinary goods traffic, but for minerals, and the traffic for which they are used, and which may be destined for South-Western stations, the South-Western and North-Western companies, acting together, give every facility for their being sent by their route. The quantity, however, requiring to be sent to the Southampton station is very small, and I do not think the granting of a through rate in respect of it would be of any public advantage.

At Brentford the South-Western station is well placed for serving the town and its traffic, but for imported or barged traffic it is not in so good a position as the Great Western station. It is only for this dock traffic that a through rate to Southampton might be of use, and that through rates are, it would seem, really asked. Goods coming to Brentford by barge can be put into Great Western trucks at the dock and taken on thence by Southall to Reading, and it would be an advantage to the public, where traffic has arrived at the dock, to be able to save the cost of carting it to where the South-Western trucks can be loaded. But the through rates as to amount must agree

with the South-Western rates in operation at Brentford, and these, it is stated, are not in all cases the same as the Nine Elms rates or the rates named in the application.

The Didcot company further ask that to the list of rates in force under our order of last year between Southampton and Paddington and Southampton and Reading a large number of dock and other rates, as set forth in schedules annexed to their application, may be added, and that Southampton West may be as Southampton Town as regards its being a terminus in respect of through rates allowed. They ask, too, for through bookings by passenger trains between Paddington and the South-Western stations at Shawford, Eastleigh, Swaythling, St. Denys, Northam and Southampton West. It seems to me that it will be in accordance with our decision last year to allow these parts of the Didcot application, except that as regards Southampton West, keeping in view the object of avoiding inconvenience to any company in extending facilities to the public, the South-Western should not be required to deal there with classes of traffic *via* the through route, which, for want of space or of suitable accommodation, they do not deal with *via* their own route. Southampton West is chiefly a passenger station, and has none of the works or conveniences, such as a goods shed, which make a station suitable to be used for a general goods traffic. Still it is a goods station for some traffic, though the quantity it can accommodate may be limited, and to the extent which the circumstances peculiar to it admit of it, should be open to traders to send to and from it by the through route. Then as to through bookings by passenger train, Southampton West and Southampton Town are on different branches or lines, and each has its separate service of trains. It is hardly possible that their respective trains can both fit in as to times with the Didcot service at Winchester, or that passengers desiring to proceed by the through route should not, in one or other case, be delayed on their journey, but, subject to the Didcot company taking the responsibility for any inconvenience of this sort, the through bookings in question may be allowed.

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LORD COBHAM : It is not necessary for me to add much to the

1897. judgment just delivered. Upon the question of the reasonableness of the route between Paddington and Southampton, *vid* Newbury, I expressed my opinion last year, and I cannot say that the evidence in this case has led me to qualify the conclusion at which I then arrived. My views, however, did not prevail, and in considering the present case I think myself bound to start with the established assumption that the route in question is a reasonable route. If that be admitted, the granting of through rates (reserving the question of amount) to and from the Great Western stations at Smithfield and Brentford seems to be the necessary consequence. At Smithfield the Great Western have their own station, between which and Paddington there is communication by rail. But the South-Western have no station at Smithfield, and they cart the large traffic which they deal with in that neighbourhood to and from Nine Elms. If the Paddington and Southampton route be a reasonable route, *a fortiori* that route prolonged to Smithfield must be a reasonable route, and the granting of through rates over it cannot, I think, be resisted. The same reasoning applies to the Great Western station at Brentford, which serves the river dock there, while the South Western station is some distance away from it. The case of Poplar is not so clear, for there, unlike Paddington, Brentford and Smithfield, the South-Western have the use of a station connected by rail with their main line, and the chief ground upon which the Paddington and Southampton through rates were granted was that that route and the Southampton route did not, as is the case with the Southampton and Poplar route, possess common termini. It is true that the South-Western are only at Poplar through their agents, the London and North-Western company, but from the point of view of the public interest, I do not think that that distinction is of much importance. There would, however, be a manifest inconvenience in granting through rates to Paddington and Smithfield and denying them to Poplar, and as I have to assume that there will be a substantial traffic to and from that station over the Newbury route, I think the through rates must be granted in this case also.

With regard to the remaining points raised in the application,

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excepting the amounts of the proposed rates, I need not add to what has been already said, with which, having regard to the decision in the previous case, I concur.

In proposing through rates between Southampton and various Great Western stations in London equal in amount to those charged between Southampton and Nine Elms and Southampton and Paddington, the applicants have raised an important question of principle. The effect of their proposal, if sanctioned, would be that the South-Western company would have to convey their traffic to and from these distant points at the same rate as that charged at Nine Elms, or lose the traffic altogether. This of itself is not a conclusive objection to the proposal of the applicants. As Mr. Littler said, the effect of granting through rates is often to reduce rates, and where this is done by fair competition the effect is perfectly legitimate. But to ensure this fair competition the Legislature has required that the through rates sanctioned by this Court should, in their judgment, be just and reasonable. It was not the intention of Parliament, nor has it been the practice of this Court, to encourage applications for through rates, the only effect of which would be to transfer traffic from one route to another or to reduce reasonable rates. In the present instance we know that the Southampton and Nine Elms rates, especially the back rates, are not, at all events, unreasonably high. They are fixed with regard to the sea competition, and they apply to one station—Nine Elms—and to no London station beyond. On the other hand, the applicants propose not only to convey traffic to and from Paddington by a route belonging to three different railway companies, and 16 miles longer than the South-Western route, at the low Nine Elms rates, but to carry it, excepting some specially low-rated traffic, to and from Smithfield and Poplar, 4 and 10 miles further respectively at the same rates. There is, then, so strong a *prima facie* presumption that these rates would only yield a bare profit, and would not, within the meaning of section 25 of the Traffic Act, be just and reasonable rates, that I think it was incumbent upon the applicants to justify their proposals, even though the South-Western company made no counter proposition, but contented themselves

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with the plea that the rates proposed were too low. Mr. Littler quoted a judgment of Mr. Commissioner Price in which he said : " If the route selected be not the best route, its inferiority will manifest itself either in greater cost of working or a less expeditious delivery. But the first of these objections applies only to the line on which the greater cost arises, and if the worker of that line does not raise it, it is not for us to do so." I doubt whether Mr. Price, in saying this, had in his mind any such case as the present. Certainly at that time through rates had never been granted over a route between which and the existing route there was such disparity as in the case here. If a general application be given to the principle laid down it would be open to any company owning a link in a possible route between the large towns to bid for and claim a share in the traffic at a rate which, while giving them a bare margin of profit, would ruinously affect the profits of the company owning the existing route. Railway companies are frequently so circumstanced that they would gladly take traffic on any terms promising the least profit. A railway company proposing through rates may stand to lose nothing by their application ; they may, like the Didcot company, be merely receiving a percentage of the gross receipts of their line, and an increased traffic, carried at whatever rates, means increased profits to them. The reasonableness of through rates proposed under such circumstances as these cannot be accepted without proof, and should be strictly scrutinised. If a contrary doctrine were to prevail under cover of judicial through rates, undue competition not contemplated by Parliament would be set up, and much of the railway traffic of the country would fall to the lowest bidder.

I am, therefore, entirely in accord with my colleagues in their refusal to regard the Nine Elms rates as the just measure of the through rates to be granted to and from Great Western stations east of Paddington, starting from the assumption that the Paddington through rates are reasonable. I agree that the measure of the Poplar through rates should be the existing South-Western rates at that station. At Brentford, the question of the quantum of the new rates does not arise, as the South-Western charge the same rates from Brentford as from

Nine Elms, and under the through rates it is not proposed to charge less. As for Smithfield, where the South-Western do not possess, or, at all events, do not make use of railway facilities, I think that the right principle has been laid down that the rates should be the Paddington rates, plus the cost of the conveyance between Smithfield and Paddington.

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[Solicitors for the London and South-Western railway company: *Bircham & Co.*

Solicitor for the Great Western railway company: *R. R. Nelson*,

Solicitors for the Didcot, Newbury and Southampton railway company: *Lake & Lake.*]

SOUTH YORKSHIRE COAL OWNERS' ASSURANCE SOCIETY

v.

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*Increase of Coal Rates—Justification of Increase—Comparative Tables—
Cool Waggon—Railway and Canal Traffic Act, 1894 (57 & 58 Vict.
c. 54), s. 1.*

July 13,
December 1,
2, 3, 1896,
February 6,
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Section 1, sub-section 1, of the Railway and Canal Traffic Act, 1894, enacts that: "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional Order confirmed by Act of Parliament."

Upon a complaint under the above section by colliery owners that, whereas the rates and charges made by the railway company for the conveyance of coal were, prior to the 1st of January, 1893, based and calculated upon the carriage of 21 cwt. to the ton, of which 1 cwt. was an allowance for "wastage," they were now based and calculated upon the carriage of 20½ cwt. to the ton, and that this admittedly resulted in an increase of 2½ per cent. upon the rate formerly charged to the applicants, and that such increase was unreasonable.

Held by COLLINS, J., and LORD COBHAM (SIR FREDERICK PEEL dissenting) that the railway company having shown at least a proportional increase in the cost of working the traffic between the year 1877, when the original rates were fixed, and the year 1892, the increase of rate was reasonable; that the fact that since 1880 the railway company had supplied waggons for the mineral trade as carriers of minerals, for the use of which a separate rate was charged, did not necessitate the exclusion of this branch of their business from the general account (for purposes of comparison, in order to ascertain a reasonable conveyance rate), because the trader providing his own waggons was also benefited by the increased facility and greater economy with which the traffic was handled; and that the cost of providing relief men for mineral trains, which was necessitated by the shortened hours of labour and the fact that such trains had to stand on one side for goods and passenger trains, was an item properly attributable to the mineral traffic, which must be worked subject to the ordinary conditions on a highway.

(1) Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

Per SIR F. PEARL: That this cost of providing relief men for mineral trains being a new expense, which, according to the railway company's tables of cost of locomotive power, mineral trains were able to be run without until 1889 or 1890, in so far as the extra men were required in consequence of the company running trains for various services and having to work them over the same line at different rates of speed, should be treated as a general charge, and be distributed over the entire traffic, and not laid on one branch of it only.

Held, by the Court, that a comparison of expenditure and receipts in any two years is a fair method of comparison where no special disturbing elements can be proved to exist. For a comparison based on train mileage to be of value, it must be shown that the conditions of working the traffic in the two compared years have remained substantially constant; which was not the case in the years 1877 and 1892, since in the latter year there was a larger proportion of long distance traffic, a mile of which brought in a smaller rate and was traversed at less cost than a mile of short distance traffic.

THIS was an application under section 1 of the Railway and Canal Traffic Act, 1894.

The applicants complained of an increase of $2\frac{1}{2}$ per cent. on the railway company's coal rates since 31st December, 1892, occasioned by their only allowing $20\frac{1}{2}$ cwt., instead of 21 cwt. as formerly, to the ton.

The railway company, by their answer, stated that before and up to 1st January, 1893, the rates in force in respect of coal were charged upon the ton of 20 cwt., but before that date, in addition to the coal upon which a charge was made, 1 cwt. to the ton was in many cases loaded when coal was destined otherwise than for shipment, and for this additional cwt. no charge was made by the railway company. The practice of allowing 1 cwt. to the ton to be loaded in addition to the amount charged for by the railway company was adopted because 1 cwt. was considered to secure freighters against the wastage in transit of such coal conveyed by the railway company. The practice of loading 21 cwt. per ton but charging for 20 cwt. was also adopted by the members of the applicant society. Owing to improvements in the facilities and conveniences afforded by the railway company for the conveyance of coal and in the conditions of transit, the amount of wastage has been materially diminished, and since the 1st January, 1893, the railway company have reduced the amount of coal which may be loaded without any charge for it being made to 2 cwt. per truck. The allowance of 2 cwt. per truck for wastage is sufficient to cover any loss of weight in transit.

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- 1896, 1897. The railway company stated that the improvements in the facilities and conveniences afforded by them for the conveyance of coal, and in the conditions of transit were as follows:—
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- (b) The increased provision of sidings for the shunting and marshalling and also for the storage of coal traffic.
- (c) The improved arrangements and working of signals.
- (d) Improvements in the design and construction of waggons.
- And that these improvements had been continuously introduced and extended for many years.

The other facts of the case and the arguments of counsel are sufficiently stated in the judgments.

Sir R. Reid, Q.C., and Balfour Browne, Q.C. (Sutton with them), appeared for the applicants.

C. A. Cripps, Q.C., and Asquith, Q.C. (Ernest Moon with them), appeared for the Midland railway company.

COLLINS, J. : This is an application made under section 1 of the Railway and Canal Traffic Act, 1894, alleging that the respondents have, since the last day of December, 1892, directly or indirectly raised the rates theretofore charged to the applicants, who are colliery owners, for coal carried by the respondents from the several collieries of the applicants to various places on the respondents' line. It is avowedly brought for the purpose of re-opening upon fresh materials, or at all events upon further discussion, the questions decided in *Rickett and Others v. Midland Railway Company* ⁽¹⁾, subject to this difference, that whereas in that case the railway company had to justify the total indirect increase of rate involved in substituting for the old practice of carrying 21 cwt. per ton an arrangement whereby they carried 20 cwt. only, but with an allowance of 2 cwt. for every eight ton truck—i.e., 162 cwt. instead of 168 cwt. for the eight ton rate—they now seek only to justify the rate based

⁽¹⁾ *Ante*, Vol. IX. 107.

upon a further modification of that arrangement whereby they have sought to give effect to our judgment in that case.

They now carry 164 cwt. instead of 162 cwt. per eight ton truck—*i.e.*, 20½ cwt. per ton instead of 21 cwt. for the ton rate. It is admitted that this results in an increase of 2½ *per cent.* upon the rate formerly charged to the applicants, and this increase and no more the respondents now seek to justify.

The applicants complain of the increase, and also of the mode in which it is effected, claiming, as they express it, “a net rate for a net weight.” The onus being thrown on to the railway company on proof of these facts, they based their justification on the same grounds as in the former case, and on the first stage of the hearing put in accounts in support of them the same as those which they had there relied upon, with one modification, namely, a new and more accurate statement, as they contended, of locomotive expenses in the two contrasted years, namely, 1880 and 1892. An adjournment was granted at the instance of the applicants to enable them to deal with this modification, and also to give them an opportunity of examining and testing by their own accountants the tables put in by the respondents. As the result of this investigation they were able at the resumed hearing in December to lay before us a statement for the year 1877, prepared on exactly the same basis as those already before us for 1880 and 1892, and also to advance arguments based upon a more complete examination and dissection of the existing tables than had been possible when they were first laid before us. So far as the legal aspect of the case is concerned, it was conducted on both sides wholly upon the lines laid down in the last case, and it is therefore unnecessary again to refer to them. But on the facts the case for the respondents was subjected to most merciless criticism by Sir R. T. Reid in speeches marked by extraordinary clearness and ability, and supported by the evidence of experts who had had ample opportunity of thorough investigation. We are therefore justified, I suppose, in thinking that now at all events all that can be said against it has been said.

As the legal element has been eliminated I might perhaps, upon a question of fact, be excused from giving more than a

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simple verdict, leaving to my colleagues the task of threading their way through these complicated accounts, and of analysing and testing the principles upon which the opposing contentions of the parties with respect to them are based. The case is, however, so much removed from a simple question of fact, depending as it does rather on the principles applicable to the due appreciation of the facts than upon any difference upon the facts themselves, and it has been so closely and ably argued by counsel on both sides that I feel bound to give reasons for my opinion.

The applicants attacked the position of the company on two main lines. They insisted, and properly, that it lay on the company to prove their justification; that the duty of the applicants, therefore, was to criticise the method adopted by the company—not to suggest a better one; and accordingly they urged, firstly, that the comparison which the respondents' accounts were framed to present, namely, that of the ratio of expenses to receipts in two contrasted years, was in itself hopelessly misleading, being vitiated by the ineradicable fallacy of confounding reduced receipts with increased expenditure; secondly, that the accounts as framed involved apportionments purely arbitrary and hypothetical of large classes of expenditure among the three great divisions of traffic, passengers, goods and minerals; and further they pointed to certain specific items which they said, even if the principle of the respondents' accounts were accepted, ought to be excluded, and if excluded would annul the supposed percentage of increased cost of work shown on the tables for the later year. They further impugned the years chosen for comparison, and urged that 1877 would be fairer than 1880, as it was the year in which the original rates were fixed.

These points, with the exception of the special items, were thoroughly considered in the earlier case, and the additional discussion they have now undergone has confirmed me in the opinion I then expressed, that a comparison of expenditure and receipts may be a fair standard by which to try the question, and, I will add, is in this case the fairest that can be applied.

Sir Robert Reid indeed admitted that theoretically it might be a fair standard if all elements disturbing the comparison

could be eliminated, but he denied that it could be in practice for the reason already stated, and he asserted that that disturbing cause was conspicuously present in the case before us; that receipts in fact had fallen, and that expenses had fallen also, and that either or both of these facts would suffice to upset the whole table. Furthermore that a falling off in receipts in either of the other two heads, passengers or goods, would alter the ratio of receipts to expenditure in the case of minerals, by assigning to them an undue share of those expenses which were apportioned to them in proportion to gross receipts on the accounts before us, and that even if all these criticisms could be answered there was a proved alteration between 1880 and 1892 in the nature of the mineral traffic resulting in a much larger proportion of long distance traffic being done in the later year. On this last point he based a double argument; first, that in itself it was a disturbing factor vitiating the comparison, and secondly, that since long distance traffic is admittedly done at a less cost per train mile, and as the train mile is, as he contended, the true standard of the whole work done by the carrier, it demonstrated that the business was now being carried on at less cost. It is due to counsel of such eminence that I should give my reasons for rejecting arguments put forward with so much force and clearness. I thoroughly agree that there can be no fair comparison of the relation of receipts to expenditure in two given years unless specially disturbing factors, if they exist, can be eliminated. I agree that a fall in receipts as distinguished from a rise in expenses in one or all of the three heads of traffic, would be such a disturbing factor, but I am satisfied that nothing of the kind has taken place. There has been no change of rate within the period covered by the comparison in any of the three branches. The evidence of Mr. Turner was clear upon this point, and such alterations as have been made in the company's business by encouraging third class traffic in the case of passengers and by developing long distance traffic in the case of minerals have been adopted because the return to be got from them was, apart from the element of increased cost of work, at least equal to that which they got before. Mr. Turner and

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Sir Henry Oakley satisfied me that such was the case, and I think the accounts support it. But failing to extract any admissions from witnesses which would support his contention, Sir Robert Reid relied on figures taken from the accounts themselves, which he claimed were conclusive in his favour. These figures show, both in the case of passengers and mineral traffic, that since 1877, the receipts per train mile have gone down, and the expenses have gone down also, though not quite to the same extent, and he claims that this shows, both that receipts have fallen, which would upset the standard of the tables, and that expenses have diminished, which disproves the respondents' case. This put in different ways and viewed in different aspects, was the basis of his whole attack upon the tables; in fact it underlies his whole position. Involving, as it does in my judgment, more than one obvious fallacy, I am the less loth to assign the credit of it where it is really due, namely, to the experts who advised him in the case, in whose evidence it appears in various forms, without the glamour thrown over it by skilful statement. To say that receipts per train mile have diminished in one year as compared with another is not *ad rem* in this discussion, unless you are comparing the same train mile in each year. It is obvious here that you are not; indeed it may almost be said that *ex hypothesi* you are not. It was admitted on all hands by experts and counsel, both on positive evidence, and from the figures themselves, that there had been a considerably larger proportion of long distance traffic in later years, and therefore the train mile taken for comparison in the later year may be supposed to be one of a larger number constituting a long distance delivery; that in the earlier year one of a smaller number forming a short distance delivery. Every mile of a long distance journey, as is well known, brings in a smaller receipt in the shape of rate, and is also traversed at a less cost, since many of the charges are fixed and others do not increase in proportion with the mileage. What bearing then can it have on the discussion to point out that this latter mile brings in a less receipt than the former? It is irrelevant on both points urged; first, because it involves a comparison of things not similar; secondly, because a diminished receipt per mile is not incompatible with an improved annual return. And

yet it is on this fact that the argument is based that there has been a drop in receipts in the later as compared with the former year, and that the tables are therefore vitiated. But this is only one aspect of the fallacy. It appears again in the argument (1) That the expenses have diminished in fact; (2) That though diminished in fact they would seem to have increased if tried by their relation to receipts; because not having diminished in quite the same proportion, they seem to bear a larger relation to them than they did in the former year. Much stress was laid on this aspect of the fallacy by Mr. Barnes and Mr. Rhodes, which reappears once more when Sir Robert Reid, asserting and contending that the accounts demonstrated a large increase or substitution of long distance traffic, claimed that the reduced expenditure per train mile established his position that the cost at which the carrier's work was done had diminished and not increased. Of course, if precisely the same proportion of long and of short distance traffic were carried in the two contrasted years there might be a sound comparison of the cost and receipt per train mile. But unless you can secure this condition the comparison is worthless, and even misleading, if it be sought to found an inference therefrom as to the increase or diminution of cost. In this case it is proved not only that there has been a larger proportion of long distance traffic, with the results I have pointed out, but also that in the later year, owing to the conditions under which mineral traffic must now be handled, a great deal more shunting had to be done per mile of journey. This swells the total mileage, and by enlarging the divisor makes it appear that each train mile in the later year is done at a smaller cost. It is the practical impossibility of disengaging the train mile test from these disturbing elements that makes it quite inapplicable as a standard in this case. The same observations apply to a comparison of the cost per ton, which is equally disturbed by the same factors. Even if it should appear that the average journey per ton was the same in the years compared, it would not follow that the proportions of long and short distance traffic had not been altered; and any such alterations would vitiate the comparison. I think, therefore, the attack directed against the tables gene-

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rally wholly failed; and, as I said in the former case, I see no reason why the principles of apportionment adopted, which are the same for each year, should vitiate the comparison under the general conditions which have been proved to exist; and I now proceed to consider whether, accepting the principles on which the tables are prepared, as affording a fair basis of comparison in the absence of special disturbing elements, such elements exist in this case, and to what extent, if any, they affect the result.

The applicants point out three items, each of which they say is improperly included in the account. First, a sum for repairs and renewals, which they say when dissected shows that in 1892 a charge for renewal of passenger engines is thrown on to the mineral expenses. This is a small item, and if taken out would reduce the percentage of increased cost shown on the table for 1892 by $\cdot 47$ only. Secondly, a sum for repairs of waggons, as to which they contend that relating, as it does, to the business of supplying waggons which the company have chosen to embark in, and in respect of which they charge a separate rate, it ought not to have any place in an account framed to show an increase of expense justifying an increase of the haulage rate. This is an important item, and if eliminated from the account would make a deduction of $4\cdot 35$ in the percentage of expenses. Thirdly, an item for relief men. This represents a sum spent in wages of extra men employed to relieve those engaged in working the mineral trains. This relief has become necessary by reason of the shortened hours of men's work now prevailing under pressure from the Board of Trade, and the longer hours of work to be performed in shunting and stopping the mineral trains when they are interfering with the fast traffic. The applicants claim that all or a portion of this item should be charged to goods and passengers, for whose benefit they contend that this expense is incurred. This item struck off would reduce the percentage of expenses by $1\cdot 54$. They also claim that 1880 is an unduly favourable year to the respondents, as the price of coal was, they assert, abnormally low, and they claim that 1877 would be fairer if the account is to be taken at all on the respondents' system; and they have therefore furnished an account of 1877 taken on that system.

I will now deal with these alleged disturbing elements in order. The first, which only amounts to '45 in all, may, I think, be conceded so far as it is made up of the expense of the renewal of passenger engines. This, I think, is to that extent a disturbing element. The second, as to waggon repairs, is much more important, and raises a serious question. The facts are that the company after 1880, finding that they were hampered in carrying on their business, and placed at a disadvantage with some competitors through not having waggons of their own, determined to take this department into their own hands, and supply waggons themselves. They hoped by these means to improve and so cheapen the service by avoiding the complications incident to dealing with the traffic without that complete control which the possession of their own waggons would give them. They did not, so far as appears, embark upon it as in any sense a separate business out of which they hoped to find a new source of revenue. They merely undertook it because they considered themselves driven to do so by the exigencies of their business, as carriers of minerals, and whether it was prudent or not for them to take the step I cannot doubt that it has largely facilitated and cheapened the handling of the mineral traffic. The problem then being to see at what expense the mineral traffic was conducted in 1892, how can any complete estimate of it be formed if the whole of this item is excluded from the account? Of course, the rate received must be and is brought into the account, but the fact that a separate rate is charged is no reason for excluding this branch of their business from the general account. They might have found themselves driven to supply waggons without a special charge. In such a case could the cost of maintaining them be excluded in any attempt to estimate the cost at which the whole business of handling the minerals was done by the carrier? Surely not. But it is said: How can a trader who finds his own waggon be asked to pay an increased rate because the company have incurred expense in finding waggons for other people? This question really begs the point at issue. It assumes that the trader who finds his own waggon has received no benefit from the change. The answer is that on the hypothesis he, as well as those who have no

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waggon, are alike benefited by the increased facility and greater economy with which the traffic is now handled, all of which is just as much present in the account in the shape of expense saved, as is the expense incurred in maintaining the waggon. I am clearly of opinion, therefore, that this item cannot be excluded from the accounts. There is no suggestion that the business of supplying and repairing the waggon has not been conducted in the most economical and prudent manner, but even if any deduction were to be made, on the ground of supposed mismanagement, a great part of the item would have to remain in the account. The applicants, indeed, while claiming to eliminate it, wholly failed to suggest how it ought to be dealt with, being, as they contend, absolved as critics from any obligation to do so. Their view, apparently, is that this is a wholly separate trade, disconnected from the carriers' business. But why, I would venture to ask, is it to be deemed more separate than is the making and repairing of passenger carriages, or of engines. The charge for both of these is just as much present in the account as if there were a separate rate for them, and if there were such rate, could this part of their business be excluded upon an investigation of the cost at which the passenger traffic was conducted?

Next, as to the third item, the sum charged in 1892 for reliefs. As to this again I am clearly of opinion that it is properly debited to the mineral traffic, upon which it is actually spent. Its relation to the goods and passenger traffic is much too indirect to warrant its being assigned to them. The line must be worked by the owner so as to deal with all classes of traffic as best he can, according to their nature and the exigencies of his business. If mineral traffic is to be worked at all on a passenger line, it must be worked subject to the ordinary conditions on a highway, where the quick traffic as well as the slow has to be dealt with, and whether the carrier be the owner of the line or another person merely having running powers over it, he must carry it under the conditions and at the cost upon which alone slow traffic can be conducted with a due regard to public safety on a line open to traffic of all kinds. There is no suggestion that the minerals have been subjected to any unfair or un-

reasonable prejudice, and the delay which they have to suffer is due solely to the large traffic of all kinds which has to be carried on the line. I think, therefore, that this item ought to be retained as it stands in the account, but it is obvious that even on the applicants' contention it could not be wholly excluded, but at most distributed.

Turning to the accounts, therefore, and taking, as the applicants suggest, the year 1877 instead of 1880 as the basis of comparison with 1892, and taking out the first of the three items named, namely, that for "repairs and renewals," from the account for both years, it leaves 48·11 per cent. as the percentage of expenses in the later year, against 41·31, the percentage in 1877. Even if the whole of the waggon repairs were struck out in addition, it would still leave a margin of 2·45, say 2½ per cent., which would suffice to cover the addition to the rate. If half the waggon repairs were left in, and all the reliefs excluded, the margin would be still larger. This is taking 1877 as the year to be compared instead of 1880. If this latter year be taken, and all the figures objected to be struck out, there remains a margin of 3·04. The price of locomotive coal was certainly unusually low in 1880, but 1877 was abnormal in other respects, and in the opposite direction, being the year in which the change in the company's rate was made, and the traffic probably to some extent thereby dislocated. I think, therefore, that 1880 is quite as fair for purposes of comparison. For the reasons I have given I think the items, except the first, are not to be excluded, but I refer to the figures in order to show how large a margin remains in favour of the railway company if the principle of the accounts be accepted. Several minor criticisms were pressed by counsel for the applicants, but, even if well founded, they made no substantial alteration in the figures, and were urged rather to show the general untrustworthiness of the accounts.

Some of the strongest observations were made upon the locomotive expenses account, but the pith of the objection was comprised in the two items, of repairs and renewals, and relief, above dealt with. I think the method adopted by the company of arriving at these expenses, being applied in precisely similar

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fashion to each year, affords fair means of comparison, and I see no reason to suppose that the portion of line selected for the experiment is not, as the respondents say it is, fairly typical of the whole line.

In the result, therefore, I think that the accounts are entirely consistent with, and confirm the strong affirmative evidence, which has not been controverted, of additional cost imposed on the railway company by modern requirements in the conduct of their business, which were referred to in the last case, and drawing an argument from the cost of train mileage, so much pressed by the applicants, I find in the fact that, notwithstanding the large addition of long distance traffic, which must have lowered the cost per train mile, it still remained in 1892 as high as in 1880, a strong confirmation of what I learn by evidence and gather from the accounts, viz., that there has been a large addition since that date to the cost at which the traffic is worked. I would add, as I stated in the former case, that the causes of this additional cost, being general, apply equally to the whole traffic, and therefore to that of the applicants. Indeed, after the full hearing which the case has now received, it seems to me that every objection which could be fairly urged against the respondents' position was pressed upon us by Mr. Balfour Browne in that case, though he avoided committing himself to some of the fallacies which I have just pointed out; and that no new factor has really been introduced into the discussion, except it be that the amount attributable to relief has been quantified. The waggon item was wholly excluded by Sir Frederick Peel on the last occasion. It seems to me, therefore, that the result is inevitable, and that we ought to re-affirm our former decision.

As to the objection to the particular mode in which the increase has been made, I think we have no right to dictate to the carrier how he is to conduct his business, so long as he does not violate the law. He has mitigated an indirect rise by an indirect reduction. We are told that to effect it in any other way would involve an enormous labour in rearranging some millions of rates varying by infinitesimal amounts, and it was proved in the last case that a system similar in principle is at

work on other railways without inconvenience. As to the few rates altered in order to make them conform to the general standard, I see no reason to interfere with these.

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SIR FREDERICK PEEL: The South Yorkshire Coal Owners' Assurance Association complain of the increase of $2\frac{1}{2}$ per cent. which the Midland Company have made since 1892 in their tonnage rates and charges for coal, by reducing the quantity to be deemed 1 ton from 21 cwt. to $20\frac{1}{2}$ cwt. The $2\frac{1}{2}$ per cent. increase supposes the $20\frac{1}{2}$ cwt. not to include any allowance to the railway company for possible loss in transit. It lies on the railway company to prove that the increase of rate caused by the alteration of weight is reasonable, and the ground on which it is alleged to be so, is the increase that has taken place in the cost at which their mineral traffic is carried. To show what this increase is they give their total mineral expenses in 1880 and 1892, and compare the percentage of the expenses for 1880 on that year's mineral traffic receipts with the percentage for 1892 (namely 39·75 and 48·58 respectively), and they contend that the difference between these percentages shows the proportion in which cost of working has increased, and the degree in which it would be allowable to have higher rates. The answer to this on the part of the applicants is that the company are wrong in their method of finding what their expenses were in those years; that there were special circumstances affecting expenses both in 1880 and 1892; that their figures when analysed do not substantiate the view that there has been an increase of cost, and that the relation of expenses to receipts is no test of how the expenses of one year stand towards those of another, for that expenses may remain constant side by side with variations in receipts. Now as the complaint is that the company have increased their rates per ton for the carrying of coal, coke, and slack from collieries in the South Yorkshire district to the various places on their system (coal for shipment excepted), and the company justify the increase on the ground that the cost of working the coal traffic is greater than it was, it will be convenient, I think, before examining the company's test of proportion of expenses to receipts, to find what the

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increased working cost comes to per ton and to compare this cost with the addition made to the tonnage rates.

The tables of working expenses on which the company rely in this case are those they used in the *Rickett Case*,⁽¹⁾ except that they have altered their apportionment of locomotive expenditure. They estimate their total mineral traffic expenses in 1892 at 1,395,926*l.*, and in 1880 at 736,902*l.* Mineral traffic is not exclusively coal, but it is so nearly so that the inclusion of ironstone or other minerals does not affect the case. The expenses of 1892 are 659,024*l.* more than those of 1880; but a large part of this sum is accounted for by an increase in mineral traffic carried. The tonnage of 1880 was 12,988,588, and of 1892, 19,226,878, and the extra sum required to work the traffic of 1892, at the same cost per ton as that of 1880, would be 354,000*l.*, though as the cost was less in maintenance of way and one or two other items in 1892, 324,000*l.* is as much of the 659,024*l.* as is chargeable to increase of work done or traffic carried. The next largest part of the increase is for waggon repairs. The figures for this item were 11,607*l.* in 1880 and 195,584*l.* in 1892, or 178,000*l.* more than the mere increase of tonnage would account for. The reason why the expense under the head of waggon repairs has increased so much since 1880 is that the company now provide a great number of trucks for the carriage of minerals. I said in the *Rickett Case*⁽¹⁾ that I did not think the costs of providing these trucks ought to be taken into account in considering a claim to increase the conveyance rates for coal on the ground of increased cost of working. I am still of that opinion. The coal rates do not include the provision of trucks, and where trucks are provided a separate charge is authorised to be made for the use of them. The sum which this separate charge, as made by the Midland Company, produced in 1892, was 223,703*l.*, and if it is sought to obtain more from the waggon business it should be done through the separate charge and not through the coal conveyance rate. The coal rate falls alike on all traders, whether they use the company's waggons or not. Owners' waggons were numerous

⁽¹⁾ *Ante*, Vol. IX. 107.

in 1892, and are so still, and that traders who provide their own waggons, and to whom therefore the separate charge is not applicable, should be required to pay a higher railway rate because other traders use waggons supplied at the companies expense, or that these other traders should pay for waggon hire not only the special charge but also a higher rate for conveyance, does not seem to me altogether reasonable or in accordance with the Companies' Rates and Charges, &c. Act. But the matter of the company's waggons affects the calculation of expenses under some other items also. Traffic expenses, general charges, law charges, parliamentary expenses and rates and taxes are divided by the company between passengers, goods, and minerals on the basis of traffic receipts, and the larger the receipts from minerals relatively to those from passengers or goods the larger the proportion of the expenses under these five heads allocated to minerals. Now, in the mineral receipts for 1892 the company have included 223,703*l.* they received in that year for the use of their waggons; and as mineral receipts equally with mineral expenses ought to be kept out of these accounts, there is an overcharge in the expenses debited to minerals in respect of these five items amounting to 28,120*l.* The percentage of these expenses is still, however, larger than it was in 1880, and the complainants contend that this is so not because of any alteration in actual expenses as between passengers, goods, and minerals; but because traffic receipts from passengers or goods have fallen off. A division of expenses in ratio of traffic receipts as a means of estimating expenses is no doubt open to question; but under the system of railway accounting in reference to these heads of expenditure hitherto in use there seems to be no better way of distributing it than according to receipts.

There is still an apparent increase in the mineral working expenses of 1892 over 1880 of 129,000*l.*, and of this, 118,000*l.* is for estimated increased cost of locomotive power. The mineral expenses under this head in 1892 were estimated in the *Rickett Case* ⁽¹⁾ to amount to 471,458*l.* The company now

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state that this figure should be 565,777*l*. In the former estimate it was assumed that the cost of locomotive power per train mile was the same for all trains (passengers, goods, and minerals), and was the quotient of their total locomotive cost divided by their total mileage. In the amended statement the estimated cost per train mile is taken to be more for goods trains than for passenger trains, and more still for mineral trains, a mineral train mile being found to cost more in coal consumed and other particulars than a goods or passenger train mile. In this way a sum of 94,000*l*. previously charged to goods or passenger traffic is transferred to minerals, and the locomotive cost of mineral traffic becomes 9·24*d*. per train mile in 1880, and 11·68*d*. in 1892, a difference of 2·44*d*., which, on the net mileage of 1892, comes to 118,193*l*. A principal cause of this increase is the provision of relief for engine drivers and firemen. This is a new and additional expense since 1880 (for the company estimate wages for overtime per working day as distinct from wages of relief men to have been the same in 1880 and 1892), and its amount is 44,080*l*., or 91*d*. per net train mile, and the reason why there is so much relieving in mineral trains is explained to be that they have to give place to other trains. In his evidence on behalf of the company, Mr. Johnson, their chief locomotive engineer, said: "Where the great part of the expenditure in relieving comes in is that mineral trains have to stand on one side for most of the other trains." It is, therefore, urged by the complainants that an expense which seems to be incurred to facilitate the conduct and transport of other classes of traffic, and for their benefit ought not to be charged to mineral traffic, and I think, as this is a new expense, one which, according to the company's tables of cost of locomotive power, mineral trains were able to be run without until 1889 or 1890, that, so far as the extra men are required in consequence of the company running trains for various services, and having to work them over the same line at different rates of speed, the expense should be treated as a general charge, and be distributed over the entire traffic, and not laid on one branch of it only. No doubt mineral trains like goods trains have a cost of their own for relieving. The cost for goods trains is 28*d*. per train

mile, and for minerals may be taken at half as much again. But for the rest of the $\cdot 91d.$ (rather less than $\frac{1}{2}d.$ per train mile) it should, I think, be divided between the three branches in the proportion of their train mileage. The sum on this account to be transferred from minerals will be about 16,800*l.* Another point affecting the estimated amount due to minerals in 1892 for locomotive power has reference to the coal carried for the company's own consumption. The quantity was 373,178 tons more in 1892 than in 1880. This coal adds nothing to the receipts from mineral traffic, while the cost of carrying it is included in the expenses with which that traffic is debited. The coal, however, is to a large extent that with which passenger trains and goods trains are supplied, and the haulage of coal required for those trains is no part of the expenses of mineral traffic. The greater quantity hauled in 1892 for those trains counts for about 8,000*l.* in mineral expenses. It is also said on the part of the complainants that in the amended statement of the cost of engine power a shunting engine mile is treated as costing the same as a running mile, and that in the *Rickett Case* ⁽¹⁾ Mr. Turner, the company's general manager, admitted that its cost was one-fourth less. On the other hand the shunting engine mileage is not in the amended table charged anything for repairs and renewals as it was before, and I am not satisfied therefore that practically it is not still charged at the lower rate. At the same time, the net train mile cost for piloting and shunting will be less than the estimated 2*·*47*d.*, owing to the reduction of the charge for relief men and the expense under this head, about 6,800*l.* under the amount it is taken at in the company's table.

Much of the estimated difference between the mineral expenses for locomotive power in 1880 and 1892 is alleged by the complainants to be the result of special circumstances in those years. Renewals of engines are one item of these expenses, and the cost of them is distributed between passengers, goods, and minerals by train mileage. Minerals, therefore, have to bear their proportion of the cost of the renewals of passenger

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(1) *Ante*, Vol. IX. 107.

1896, 1897. engines, just as passengers and goods have as to engines of the mineral class. But it appears that in 1892 the number of passenger engines renewed was exceptionally large, and that there were thirty such engines as against five in 1880. With an inequality of numbers so much above the general proportion, the mineral expenses under the head of engine renewals in 1892 cannot fairly be compared with those of 1880; and the only course open is to omit the item from both years, and 2,341*l.* being the cost in 1880 and 13,563*l.* in 1892, the sum to be deducted from the expenses of 1892 is 11,222*l.* Coal consumed is another item of locomotive expenses, and its higher price in 1892 compared with 1880 adds 39,236*l.* to the mineral expenses of 1892. The price per ton in 1880 was 5*s.* 9½*d.*, and in 1892 9*s.* 2½*d.*, and neither price was normal. That of 1880 was lower than the price of any other year from 1874 to 1892, and that of 1892 much above the average for those years. 1880, therefore, is too special a year to show how much the company's expenses for coal had increased in 1892; and if single years are to be compared, the price of coal in 1892 should be compared with its price in 1877, in which year the rates to London and other principal South Yorkshire coal rates were last revised and fixed. The price of coal in 1877 was 7*s.* 8½*d.*, and the difference from comparing 1892 with 1877 instead of 1880 as to the article of coal will reduce the estimated increase of cost for locomotive power by 22,283*l.* The estimated increase of the mineral working expenses of 1892 has now dwindled down to a sum of 64,000*l.*; and upon the mineral tonnage carried in 1892 works out about .80 of a penny.

The course adopted by the railway company to show that mineral working expenses have increased is to compare the sum per cent. of mineral receipts expended in 1892 with the corresponding sum in 1880, and they bring out the percentage for 1880 at 39·75 and for 1892 at 48·58, but both the way in which they calculate the expenditure of 1892, and the principle of measuring its rise by its relation to receipts are objected to by the applicants, who say further, that considering the exceptionally low price of coal in 1880, that year ought not to be chosen to compare 1892 with, and that 1877 should be taken instead.

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The total mineral expenses in 1892 are stated by the company to have been 1,395,926*l.*, but did not, as the complainants contend, exceed 1,114,169*l.* They take out the item of waggon repairs 195,902*l.*, and take 28,120*l.* off the items, such as that for traffic expenses, which are divided on the basis of traffic receipts, on the ground that waggon hire receipts are improperly included, and a further sum of 57,643*l.* off the item of locomotive cost in respect of relief drivers and firemen (44,080*l.*) and of engine renewals (13,563*l.*). I have already dealt with each of these sums, and except as to 27,300*l.*, part of the deduction claimed in respect of relief men, have given my reasons for thinking that the complainants are entitled to have them treated as forming no part of the expenses with which we are concerned. But even without them those expenses come to more per hundred pounds of receipts than the expenses of 1880, and if 1880 is a legitimate year for a comparison with 1892, and a rise in expenses is shown by their percentage of receipts, the company make out a case for the extra rates imposed. But the low price of coal in 1880 kept down the expenses of that year, and make it ineligible for the purposes to which it is applied, and 1877 is, I think, to be preferred, notwithstanding the two circumstances said to weigh against it—namely, its mineral mileage not reaching the level of 1875, and its coinciding with a time when high prices for working and large receipts still prevailed. It is recommended as the year from which the rates proceed, and as the beginning, as 1892 is the end, of the period during which they remained in force without alteration. As to measuring expenses by their magnitude with respect to receipts, it is obvious the latter may vary as well as the former; and the higher percentage of 1892 may be partly due to receipts having gone down. This is the view of it suggested by the applicants in their evidence, and they consider that a more accurate test of expenses would be the comparative cost of train mileage at the different dates, and they put in a table to show that per total train miles the mineral expenditure in 1892 (according to their calculation of it) was only slightly more than in 1880, and actually less than in 1877. The company, however, deny that a satisfactory result can be obtained by

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applying the train mile principle, because if the average distance traffic was carried was longer in 1892 than in 1880, or 1877, as it is asserted it was, and as the reduced receipts per train mile (rates not having been altered) seem to show, the cost per train mile would decrease. But keeping to the company's test of gross receipts, not including, however, in their amount what was paid to the company for use of trucks, the increase of expenses in 1892 over 1877 did not exceed $1\frac{1}{4}$ per cent., and it has not been proved, therefore, that the increase of rates complained of is reasonable.

The applicants also complain of a few cases in which there has been a direct increase of rates since 1892. The coal rate, for example, to Leicestershire from Car House colliery is 3*d.* more than it was, and from Aldwarke 2*d.*, and to Derby (City Road station) from Car House 1*d.*, and to Derby (London Road station) from Aldwarke also 1*d.* The answer of the company is that in these, and the other cases, the former rates were lower than the rates to the same station from other collieries, and lower also than the rates which their distances made them liable to, under the company's general scale of charges; and that when revising their rates at the end of 1892 they took the opportunity to put the rates in question on the same mileage basis as the rates from other collieries. This, I think, is a fair and sufficient reason.

LORD COBHAM: In the cases of *Rickett Smith & Co.*, and the *Grassmoor Company v. The Midland Ry. Co.*, which were defended by the railway company upon practically the same grounds as the present case, I concurred, although with some hesitation, in the decision that the railway company had justified the increase in the coal rates charged to the applicants to the extent of 2*d.* a ton upon the London rates and a proportionate amount upon the other rates which had been increased. To this conclusion I consider myself bound to adhere, except in so far as fresh evidence or arguments in the present case may have induced me to modify it.

One of the main difficulties I found in the former cases was in accepting either of the methods proposed by the parties for

comparing the cost of the Midland coal traffic in the two selected years, and I thought the onus being upon the railway company, that they ought to have laid before us a more direct and less questionable method of establishing their case. But I am satisfied that, whatever be the obligations upon railway companies under the Act of 1894 to keep their accounts in such a form as may directly and not inferentially show increases or decreases of expenditure under different heads of traffic, it would not be just to hold them responsible for the imperfect data which is all that they can possibly supply when a comparison has to be made with a period fifteen or twenty years distant. Some basis or standard of comparison must be set up, whether it be the ratio of expenditure to receipts, the expenditure and receipts per train mile, or per tonnage carried. Of these, the first seems to afford the least intricate and deceptive method of instituting the required comparison in the present case. For it need only be shown that there has been no decrease of receipts to establish the fact that the whole of the increase of the ratio of expenditure to receipts has been attributable to increased expenditure. I fully agree with the learned judge that there has been no proof given of any such decrease in the receipts. The facts and figures, even those based upon net train mileage, all point the other way, unless I accept the comparative table of receipts and expenditure per train mile submitted by the applicants, which shows a decrease of receipts since 1877 per train mile of 6·56*d.*, and a decrease of expenditure of 2·51*d.* But for a comparison based on train mileage to be of value, it must be shown that the conditions of working the traffic in the two years have remained substantially constant. If it be true, as both sides seem to allow, that long distance traffic has increased relatively to short distance traffic, an actual decrease in expenses per train mile might be shown, while there might in reality be an increase in the net cost to the company. A further objection to the applicants' comparative table is that the divisor taken is the gross train mileage, which includes shunting and auxiliary engine mileage, whereas the earning or net train miles, it seems to me, ought to have been taken, which would have brought out a very different result. I conclude,

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therefore, that in this case we may safely take the increase of the ratio of expenditure to receipts to be due to the increase of the company's expenditure, provided, of course, that the correctness of the figures upon which the ratios are based can be maintained.

The most important by far of the criticisms which the applicants have made upon these figures has reference to the items of coal waggon expenses and receipts, which they contend are wrongly dealt with in the company's tables. *Primâ facie*, no doubt, it seems that there is such a difference in the circumstances of the case between 1877 and 1892 that no fair comparison is possible. In 1877 the company owned only 2,224 coal waggons, but they subsequently adopted the policy of providing so far as possible their own rolling stock for the conveyance of their coal traffic, so that in 1892 this number increased to 50,184 waggons, and the cost of repairs increased from 10,967*l.* to 195,984*l.* Further, the company having acquired under their Provisional Order Act of 1891 the power of charging for the use of their waggons, a new item of 223,703*l.* appears under this head upon the receipt side of the waggon account. This is included in the general mineral receipts, and thus increases the expenses debited to minerals under those heads of expenditure in the table where the apportionment is made upon the basis of traffic receipts. The question is whether this method of dealing with the figures has unduly increased the ratio of mineral expenses to receipts in 1892, or whether, as urged by the applicants, it would not be fairer to omit the figures altogether which, while only affecting the ratio of 1877 to a slight extent, would reduce that of 1892 by about 4½ per cent. It appears to me that if the principle of comparing the expenditure of the two selected years with the receipts of those years is admitted, the company's method of dealing with those figures is justified. In 1877 there were practically no expenses and no receipts on waggon account. In 1892 the company had embarked upon their new policy of finding their own coal waggons, and the new expenditure and its financial results duly appear in the figures furnished by the company. Thus in each table the whole expenditure and receipts are accounted

for. The applicants on the other hand contend that the 1892 figures of their waggon account given by the company, viz., 196,000*l.* in expenditure and 223,000*l.* in receipts, should be struck out as being abnormal, and therefore vitiating the comparison with 1877. No doubt if it be shown that in an important branch of railway working newly undertaken since 1877, the ratio of expenditure to receipts in 1892 was so high as 88 per cent. against an all-round ratio of 48½ per cent., it must be conceded that some abnormal conditions had arisen, or that a great blunder in policy had been committed for which it might be argued that the traders ought not to suffer, but this theory assumes that the 223,000*l.* paid by the traders for the use of the company's waggons is all that the company have earned in return for their expenditure in carrying out their new policy; in other words that the company involved themselves in an enormous capital outlay and an annual charge of nearly 200,000*l.* in maintenance, with the prospect of only earning a sum barely sufficient to cover the latter charge. I cannot take this view. The ownership and control of the rolling stock employed in the coal traffic must tend, as the learned judge points out, to some extent to facilitate and increase traffic, and must conduce to economy in working and to a reduction of expenses under the most important heads of the company's tables. These indirect earnings of the company's newly acquired waggons have not been eliminated from the tables, nor could they be, for they are inextricably distributed throughout the account. But it is manifestly unfair to wholly exclude the expenditure on waggon account and only partially exclude the receipts. The error, if it be one, is important, for by striking out these two items of expenditure and receipts standing in the ratio one to the other of 88 per cent., the general ratio in 1892 of 48½ per cent. is reduced to a little over 44 per cent. It is not unreasonable, I think, to conclude, in the absence of any evidence or probability to the contrary, that the returns upon this particular undertaking give a larger percentage of profit to the company than the two eliminated figures indicate, and one more nearly commensurate with the general ratio of remuneration earned by the company. Some

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support is given to this view by the fact that the actual cost of repairs per waggon, at all events judging from such figures as we have, seems to have fallen about 20 per cent. For the foregoing reasons and others stated by the learned judge, I hold that if 195,000*l.* on one side of the account, and 223,000*l.* on the other were excluded, the tables could not possibly give a true view of the case. On the other hand, by their method of accounting in both years for its total expenditure and receipts, the company, in my opinion, may claim to have presented a complete statement of the essential facts of their case, and even though the actual results of every department of their working cannot be separately distinguished, full effect is given to them in the general ratio of expenditure and receipts in 1877 and 1892.

A further contention of the applicants is that the expenditure of 44,000*l.* upon relief men employed in 1892 in working the mineral traffic is, in reality, due to the exigencies of passenger and goods traffic, and should be debited to them. I hesitate to adopt the principle of this objection, which, I think, if pushed, might land us in great difficulties. It is manifestly impossible to isolate one class of traffic and to calculate what its cost would be if the other classes did not exist. No doubt, if abnormal conditions can be shown to have arisen, such as a great relative increase in passenger or goods traffic, due weight should be given to the fact. But, in the present instance, the chief increase since 1877 has been in the mineral traffic, and it is well known that, largely owing to that increase, the Midland company have had difficulty in working their line. Under the circumstances, the proposal to relieve minerals of the whole cost of the additional labour employed in 1892, seems to me quite inadmissible.

I have throughout taken 1877 as the year with which 1892 should be compared. There are obviously strong *prima facie* grounds for selecting the year nearer the period when the rates were originally fixed rather than one more remote, and certainly a very strong case should be made out for selecting a period so much as three years subsequent to the fixing of the rates. No doubt, in some respects, the choice of 1877 was open to objection, but not, I think, of a very serious character; but, on the

other hand, a most important departure from average conditions can be proved against 1880, because in that year the price of locomotive coal fell to the lowest point touched in the last twenty years, namely 5s. 9d., against an average for the period between 1877 and 1892 of 7s. We are told that 1,200,000 tons of locomotive coal are consumed in the year by the Midland railway company, so that a difference of 1s. 3d. a ton upon the coal consumed in their mineral traffic must represent a very large sum. I cannot think, therefore, that the selection of 1880 in preference to 1877 can be justified.

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Criticisms of more or less importance in addition to those above dealt with have been made upon the company's tables, and some, I think, substantiated, such as the criticisms upon the inclusion of the charge for duplicate passenger engines in 1892; the inclusion of the cost of conveying coal for the use of passenger or goods engines, and the large margin of error that may exist under the system of apportioning expenditure on the basis of gross receipts. But when I concurred with the decision in the *Rickett Smith and Grassmoor Cases v. The Midland Ry. Co.*, I allowed to the best of my ability for the possibilities of error which I was assured could be found in the railway company's case, some of which I then indicated. Against these doubts and criticisms the company may fairly set the considerable margin which they can show over and above the bare figure of increased expenditure required to justify their increase of the rates charged to the applicants.

My conclusion then is that the facts and figures brought before us in the previous case against the railway company have remained substantially unchanged, and that we should not be justified in altering the decision which has already been based upon them.

With respect to the direct increases of certain rates, of which complaint has been made, I agree with my colleagues that the railway company have shown them to be reasonable.

[Solicitors for South Yorkshire Coal Owners:—*Fishers*, for *Parker Rhodes & Co.*, Rotherham.]

Solicitors for the Midland railway company:—*Beale & Co.*]

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v.

MIDLAND RAILWAY COMPANY ⁽¹⁾.

Through Rates—Right to apply for Exceptional Rates—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25, sub-s. 9.

February 4, 5,
6, 8, April 10,
1897.

A canal company authorised by Act of Parliament to construct railways on their quays and land, and to charge reasonable tolls and charges for the use of the same within a maximum fixed by their Railway Charges Confirmation Act, 1893, although they are under no obligation to admit the public as carriers upon their lines under the Railway Clauses Act, 1845, are a "railway company" within the meaning of the Railway and Canal Traffic Act, 1888, and, whether express powers of carrying upon their lines have been given them or not, are competent to propose through rates under the 25th section of that Act.

When a railway company has agreed rates from a port to inland towns with other companies in their joint interest, such rates should not be treated as local rates of that company, so as to compel them to carry to the common point from another port at rates equal, distance for distance, to such agreed rates.

THIS was an application for through rates under section 25 of the Railway and Canal Traffic Act, 1888.

The rates proposed were to be exceptional rates for grain and timber between Manchester docks and several inland towns on the Midland railway, among which were Birmingham. The applicants stated that the rates had been compiled upon a reasonable basis, having due regard to the rates with other ports. The ports taken for the purposes of comparison included the Severn ports, and also several, such as Hull and Grimsby, to which the Midland railway company had no line themselves.

The Midland railway company, by their answer, objected to the application on the following grounds:—

1. That the applicants were not a railway company nor a

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

forwarding company within the meaning of the Railway and Canal Traffic Act, 1888, s. 25, and consequently could not apply for through rates.

2. That the through rates were not a reasonable facility in the public interest.
3. That the proposed rates were too low, and would compel the railway company to lower their rates by another line between the same points, and so contravene subsection 9 of section 25 of the said Act.

The Manchester Ship Canal company had constructed the railways under two Acts of Parliament; one of 1885 and the other of 1890. By the Act of 1885, the principal lines were authorized (subject to deposited plans and sections), also some incidental railways; while certain former public railways (after deviations had been made for the railway company concerned) were vested in the canal company. Reasonable tolls were authorized to be charged, and the right was granted of making arrangements with the various railway companies as to interchange of traffic with their lines.

By the Act of 1890, the canal company were authorized to raise additional capital, and to construct railways on the quays to be connected with the systems of certain railway companies. The Railway Clauses Act, 1845, was not incorporated in this Act, and no plans were deposited.

The canal company submitted rates on the railways constructed under both these Acts in accordance with section 24 of the Railway and Canal Traffic Act, 1888, to be dealt with by the Board of Trade, and the Railway Rates and Charges Order Confirmation Act, 1893, fixed the maximum charges on the "railways of the Manchester Ship Canal Company."

Balfour Browne, Q.C., Asquith, Q.C. (Waghorn and Whitehead with them), for the applicants.

By section 1 of the Railway and Canal Traffic Act, 1854, a "railway" includes a station, though that is not authorized by Act of Parliament; and a "railway company" includes "any person being the owner of, or any contractor working any railway constructed or carried on under the powers of any Act

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of Parliament." The Regulation of Railways Act, 1873 (the definitions of which are incorporated in the Act of 1888), defines a "railway company" in similar words. These railways were constructed under the powers of the Act of 1890, although their position was not absolutely defined; at all events, they are "carried on" under that Act. Plans and sections were not necessary, as the railways authorized under the Act of 1890 were entirely on the canal company's own land. They are only deposited under "Standing Orders," which have no authority as an Act of Parliament. The preamble of the Act of 1890 shows they were to be railways in connection with through traffic.

The facts that powers to charge reasonable tolls, rates and charges, were granted by the said Act; and that the company were not to be exempted from the provisions of any general Act relating to railways, show clearly it was a railway to be used for the purposes of public traffic. Whether carriers or not, they can propose through rates under section 25 of the Railway and Canal Traffic Act, 1888.

The docks and the Cornbrook sidings of the Midland company at Manchester are not to be regarded as the "same point" within the meaning of sub-section 9 of section 25 of the Act of 1888.

[They cited *In re East & West India Dock Co.*, 38 Ch. D. 576.]

C. A. Cripps, Q.C., and *Ernest Moon* for the Midland railway company.

The applicant's railways, which were constructed under the Act of 1890, are merely dock sidings, described in the Act as "subsidiary works." The canal company have no power to act as carriers, nor is the right of public user given by the incorporation of the Railway Clauses Act, 1845. Without this, the undertaking has not the ordinary incidents of a railway.

The Midland railway company's local rates from Manchester are protected by sub-section 9 of section 25 of the Railway and Canal Traffic Act, 1888. Manchester must be regarded as one point under this section, and the Midland company's route

as another line of communication between the same points. The meaning of this sub-section is, that the Court is not to use its powers as to fixing through rates for the purpose of interfering with and decreasing rates which the railway company is properly charging on its own local system.

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COLLINS, J.: The proviso in the 9th sub-section seems to assume that the railway company against which a through rate is asked, is already in possession of the traffic between the same points. What it assumes is asked is, that the traffic shall start from the same point and arrive at the same point, but that it shall go over a different route part of the way. It may be perfectly fair in that case that the railway company against whom the order is asked, having already got the benefit of the traffic, should not be compelled to assent to carry the same traffic at a lower rate by another route. In the present case the Midland railway company are not in possession of this traffic at all, because that railway company's line is not in physical contact with the port. The Severn ports must not be considered, owing to the decision in the case of the *Liverpool Corn Traders' Association against Great Western Ry. Co.*⁽¹⁾, which justified an inequality of treatment between them and Liverpool with regard to trade to the Midlands.

The judgment of the Court was delivered by Sir Frederick Peel.

SIR FREDERICK PEEL: This is an application for exceptional through rates for grain and timber from the Manchester docks to various towns in the Midlands on the respondents' railway. The granting of them is opposed by the Midland company, who besides objecting to the proposed rates as too low, and to the principle on which they have been compiled, deny the claim of the Ship Canal company to be a company entitled to propose compulsory through rates.

The Canal company were by their original Act of 1885 authorized to make, as a part of their undertaking, certain

⁽¹⁾ *Ante*, Vol. VIII. 114.

1897. branch railways, and in respect of the use of them the usual toll clauses of Railway Acts were inserted in that Act. They were further authorized by their Act of 1890 to make railways on their quays and on any land belonging to them, to raise additional capital for the construction of such railways, and to take for the use of them such reasonable tolls and charges as they might from time to time appoint. Under this 1890 Act sidings and main lines many miles in length have been made, and are being worked by the Ship Canal company, and as contemplated by the Act, have also been connected by junctions with the systems of several large railway companies, and the proposed through route is from the Ship Canal docks or wharves *via* these main lines to one of these junctions, that at Cornbrook, and thence to the Midland stations for which the traffic is destined. Parliament has also regarded the Ship Canal company as a railway company coming under the section relating to railway rates and charges of the Traffic Act, 1888, and has passed an Order Confirmation Act, which fixes the maximum charges applicable to their railways, whether made under their 1890 Act or under the previous Act of 1885. Looking at these various enactments, I think that the Ship Canal company are a railway company, and are one in the sense in which that term is used in the Traffic Act of 1888, and that whether express powers of carrying upon their lines have been given them or not, they are competent to propose through rates under the 25th section. It is said that the lines made under the Act of 1890 are not public railways and cannot therefore form part of a through route. This is said because the Ship Canal company seemed to the respondents to be under no obligation to admit the public as carriers upon these lines, the Act of 1890 not incorporating that part of the Railway Clauses Act, 1845, which gives all parties the right, upon certain conditions, to use a line with their engines and carriages. But that to be subject to such a right is not a necessary incident of a public railway appears by the case of stations. The Railway Clauses Act confers no right to use a station, but this does not prevent a station being held to be used for public purposes and to come under the provisions of the Traffic Acts, and in like manner a railway, though competing

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carriers may have no right to come upon it, may still be a public railway, and we are of opinion that the railways of the Ship Canal company made under the powers of the Act of 1890, and governed, as to the charges, by the Company's Confirmation Act, 1893, are public railways, and that the Acts for regulating traffic on railways in the interests of the public are as applicable to them as they are to any railways.

Grain and timber for which the exceptional through rates to and from various inland towns on the Midland system are asked are in Class C, but are at the same time articles which it is usual for companies to carry at less than the ordinary class rates. Most of the ports are able to send this kind of traffic inland at reduced rates, and the advantages so enjoyed by the ports, which the Ship Canal company consider to be their competitors, are what they seek by this application to obtain for their own port. Much, of course, depends upon the ports so selected being proper ones for the purpose, and it is upon this point that the parties before us differ. It is proposed that the rates between the docks and the respective inland towns should as to each town be the same relatively to distance as the rates at which grain and timber may be sent to it from some other port. Thus the grain rate to Birmingham is made out on the Bristol rate to that place, the rate to Normanton on that from Hull, the rate to Ambergate on that from Grimsby, and so on. Now, as to the rates compiled on the principle of which Ambergate is an instance, it is to be observed that where a company carries in conjunction with another company, the rates to be charged and the mode of dividing them must be a matter of arrangement between the companies. Rates from Grimsby and Hull are rates so arranged. The Midland company is not at those places. One is a North Eastern port and the other Manchester, Sheffield and Lincolnshire, and we do not think we ought to treat rates, agreed with other companies in the joint interest, as if they were local rates of the Midland company, and compel that company to carry from Manchester to the common point at rates equal, distance for distance, to such agreed rates. Nearly half of the proposed through rates for grain fail, I think, upon this ground, and it is the same with a still larger proportion of the timber rates, two-

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thirds of which are formed out of the rates from West Hartlepool, which is another North Eastern port, and a long distance from any Midland line. Most of the remaining through rates are taken from the rates at which the Midland company carry from Gloucester or the Bristol ports. They carry grain for instance from the Bristol ports to Birmingham, a distance of 102 miles for 7s. 8d.; and the distance from Manchester to Birmingham being the same (104 miles) 7s. 8d. is the amount of the proposed through rate. This is objected to by the Midland company on the ground that it was decided by this Court in a case heard in 1892 ⁽¹⁾ that the inequality in the Liverpool grain rates to the Midlands as compared with the Severn rates was not unreasonable: and they say that this inequality could not be maintained if the rates from the Severn ports were to be conceded to the Manchester docks. It is, of course, open to the Ship Canal company, or any persons interested, to contend that the circumstances are not the same, and that as far as Manchester as a port is concerned, it would be an undue disadvantage to it that its rates for grain and timber to the Midlands should be proportionately to distance, higher than the rates from these western ports. But, until it is shown that Manchester is to be distinguished, we think we ought to abide by the principle of the decision in the case referred to and, for the present, at least, not to allow these proposed through rates.

In fixing the rates to Tamworth, Nuneaton, Thrapstone, and Luton, in accordance with the Midland company's rates to those places from Liverpool, the Ship Canal company have assumed that these latter are determined by the distance of the Midland route. They are, however, it seems, governed by the shorter competitive distance of the London and North-Western route, and, as the distance to the four towns in question from Liverpool by the London and North-Western, and from the Manchester docks by the Midland, do not materially differ, the ground on which the amount for the through rates is asked does not exist.

Rates from Lynn do not appear to furnish a satisfactory basis

⁽¹⁾ *Liverpool Corn Traders' Assn. v. Great Western Ry. Co.*, ante, Vol. VIII. 114.

for through rates from the Manchester docks; they would make the through rate for timber to Market Harborough, distant 107 miles, 10s. 8d., and to Bedford, distant 140 miles, 10s. 2d. only.

In a few cases the proposed rates are not in controversy, being the same as are in force from Cornbrook sidings. These may be allowed, as may also the timber rate to Bakewell altered to 5s. 10d., the grain rate to Kettering altered to 12s. 6d., and the port to port rate to and from Bristol, limited to traffic for shipment.

As regards apportionment, the Ship Canal company propose that they should be allowed 1s. 6d. out of each through rate, made up of 1s. 4d. per terminals and 2d. for haulage on their main lines. We think as to the 1s. 4d. that they should have that sum if they perform terminal services at their end as such services are performed at the other end, and that they should also have the 2d. in the cases to which Mr. Marshall Stevens, as we understood him, limited his claim, namely, where it was made an item in the rate.

[Solicitors for the applicants: *Grundy, Kershaw, Saxon, Samson & Co.*, for *Grundy, Kershaw & Co.*, Manchester.]

Solicitors for the Midland railway company: *Beale & Co.*]

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CORPORATION OF BIRMINGHAM AND
SHEFFIELD COAL COMPANY, LIMITED,

v.

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY
COMPANY,

MIDLAND RAILWAY COMPANY, AND

LONDON AND NORTH-WESTERN RAILWAY COMPANY ⁽¹⁾.

Through Rates—Reasonable in the Interests of the Public—Comparison of Through Rates over Routes composed of the Lines of different Railway Companies—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25.

July 16, 17,
1897.

In allowing or fixing through rates the Railway Commissioners will consider all the circumstances of the case, and one of the circumstances is, what powers the particular railway companies whose lines are part of the through route have of demanding rates.

On an application to allow a through rate, it was proved that there was in existence a rate arranged between the parties which was virtually a through rate, and which rate was much lower than the sum of the local rates over the lines which constituted the through route. The through rate applied for involved a still further reduction of about 6d.

Held that under these circumstances the onus was upon the applicants to prove that the through rate which they proposed was a just and reasonable rate.

The proposed rate was over a route composed of three lines, which carried for about six, forty-five and twenty-five miles respectively of the route. It was proved that there was an alternative route which was composed of two lines, and which passed for the same short distance of six miles over the line, which was common to both routes, and the entire residue of seventy-five miles over that of another company, and that there was an existing rate by the alternative route of 6d. less than the existing rate over the route for which a through rate was proposed.

Held that it did not follow, that because the rate over the alternative route

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount CORHAM, sitting at the Royal Courts of Justice, London.

was reasonable, and was smaller in amount for a slightly longer distance, that the existing rate over the route composed of three railways, five miles shorter, and which was 6*d.* higher, was unreasonable.

THIS was an application by the Corporation of Birmingham and the Sheffield Coal company to the Commissioners to allow a through rate over the lines of the three respondent companies from the Birley collieries of the coal company, situated on the line of the Manchester, Sheffield and Lincolnshire railway company, to Windsor Street, Birmingham. The through rate proposed was 3*s.* 9*d.* a ton, a rate 6*d.* per ton lower than the existing rate between these points, but equal to the rate between the collieries and Lawley Street station in Birmingham. The latter rate was for conveyance over a different route, and the lines constituting that route were owned by two companies, while the proposed rate was to be applied to a route composed of lines belonging to the three respondent companies.

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Balfour Broune, Q.C., C. A. Russell, Q.C., and Sutton appeared for the applicants.

Noble for the Manchester, Sheffield and Lincolnshire railway company.

C. A. Cripps, Q.C., and Noble, for the Midland railway company.

C. A. Cripps, Q.C., and Ernest Moon for the London and North-Western railway company.

The judgment of the Court was delivered by Collins, J.

COLLINS, J.: We are all of opinion that this application fails. There is in existence at this moment a rate, not a through rate in the technical sense of the term imposed by the Railway Commissioners, but there is a rate arranged between the parties which is virtually a through rate at this moment, and that through rate is, in the aggregate, a very much smaller sum than the sum of the local rates over the lines which constitute the through route. The application involves the still further reduc-

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—

tion of about 6*d*. It seems to me under those circumstances that the onus is clearly upon the applicant to show that the rate which he is proposing is a just and reasonable rate.

Now I agree that it would be very desirable for the owners of the Birley collieries and for the Corporation of Birmingham who with them make this application, to secure the transit of coal from those collieries to Birmingham, and that unquestionably is one of the factors that we have to consider in discussing this case; but then comes the question at what rate is it fair to the railway companies to insist that the traffic shall be carried. In dealing with that I think we are bound to take all the circumstances into consideration. One of the circumstances here is, that the proposed rate is over a route composed of three lines, one of which carries for about six miles of the route, and the other two—the Midland and the North-Western—over distances, one of them of about forty-five miles, and the other of about twenty-five miles. The chief argument addressed to us in respect of the proposed rate as against the one now in question is, that on an alternative route which is composed of two lines, and which passes for the same short distance over the line of the Sheffield company—that is common to both—and the entire residue over that of another company, the Midland: the argument addressed to us is, that over that route so composed there is in existence at this moment a rate which is, I think, some 6*d*. less than the existing rate over the route which is now the subject-matter of this application. When analysed, it seems to me that that argument really involves the question of undue preference. It is only by introducing a comparison on the same conditions as those by which an undue preference is determined that this alternative route really comes into the discussion at all; but, when you come to compare the circumstances, they appear to be quite different. To begin with, as I have pointed out, it consists of a route over two railways only, one of them extending for about six miles, and the other for something over seventy, and I do not think that it in the least follows that because the rate over that route is reasonable and is smaller in amount for a slightly longer distance, that the existing rate over the route composed of three railways five miles shorter,

and which is 6*d.* higher, is unreasonable. I do not think it follows at all; for this reason: the conditions under which the two traffics are carried are totally different. We have to consider, in fixing a rate, all the circumstances of the case, and one of the circumstances must be what power the particular railway companies over which the route passes themselves have of demanding rates. When you are dealing with a route composed of two long leads the rights of the companies in respect of the passage over their line may be very different from what they are if you are dealing with a route composed of certain short leads. No railway company can get as much out of a series of short leads as it can out of a long lead; and though the Legislature contemplates that the route, made up of all the different factors, shall be treated as one line, still in fixing the rate we are bound to take all the circumstances into consideration, which in the one case may be that the companies forming the route have in the aggregate a much higher charging power than they would have in the other; and inasmuch as we are invited to cut it down, there must always be a question, I think, of the burden which would be imposed upon these companies in asking them to abate, in the one case, from a much larger sum than in the other. Therefore it seems to me that these considerations disturb the suggested comparison between the route made up of the two railways and that made up of the three.

We have been helped in this case by evidence as to the actual proportions which each of these railway companies now receive out of the existing rate over the three railways; and it turns out that a large part of the difference, almost the whole difference, between the proposed rate and the rate actually charged is commensurate with the difference in the sum that the Sheffield railway company receives out of the rate when the transit is over the lines of the two companies as compared with that which it receives where the transit is over those of the three; and the suggestion is, that *prima facie* that is an unreasonable demand on the part of the Sheffield company, and therefore that it may fairly be struck off, leaving practically the amount now asked for in the proposed rate. But the evidence is, that

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the arrangement under which, in the one case, the Sheffield company gets more than they do in the other is part of one large bargain which regulates the whole of the traffic passing from this colliery over the Sheffield and on to the Midland system, whether it stops on the Midland railway or goes to stations beyond the Midland railway. It is a give-and-take bargain between the Sheffield company on the one hand and the Midland on the other; the Sheffield having another available route by which they might send the traffic, and the bargain being one whereby the Midland have acquired from the Sheffield company the right to receive their traffic and deliver it on these terms. I do not think it would be possible or fair for us to interfere with one particular part of this bargain without having the whole question before us—which we have not—as to its reasonableness. We are told, and I have no reason to doubt it, that whatever decision the Commissioners come to on the matter, the share of the Sheffield company in the new and diminished rate would have to be ascertained upon the footing of this bargain. We have no reason whatever to suppose that that arrangement between the Sheffield company and the Midland company is not a perfectly reasonable arrangement, therefore I think that special ground for diminishing the rate fails. That throws me back on the question whether the aggregate rate which is suggested is, in view of all the circumstances, so reasonable and just that I should be justified in accepting it instead of that which now exists. The one which now exists involves a considerable abatement upon the rights of the railway companies under their statutes; that which is proposed seeks to force upon them a still larger reduction. It does not appear to me to have any compensating element which would make it just; nothing has been pointed out; and I do not think, without some suggestion of some compensation to the railway companies, we should be acting justly in forcing them to accept a still further reduction of their statutory rights. I think, therefore, this application fails.

[Solicitors for the applicants: *Fishers*, for *Parker, Rhodes & Co.*, Rotherham.

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Solicitors for the Manchester, Sheffield and Lincolnshire railway company: *Cunliffes and Davenport*, for *R. Lingard Monk*, Manchester.

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Solicitors for the Midland railway company: *Beale & Co.*

Solicitor for the London and North-Western railway company: *C. H. Mason.*]

PLYMOUTH, DEVONPORT AND SOUTH-WESTERN JUNCTION
RAILWAY COMPANY

v.

GREAT WESTERN RAILWAY COMPANY AND
LONDON AND SOUTH-WESTERN RAILWAY COMPANY ⁽¹⁾.

Through Rates for Goods—Reasonable Route—Point of Exchange—Sending Company's Claim to Long Run—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25.

March 21, 23,
1899.

On an application for through rates, the fact that the station where it is proposed to exchange the traffic is not, in any reasonable sense, a practicable one for that purpose will go to show that the proposed route is not a reasonable route within the meaning of section 25, sub-section 5, of the Railway and Canal Traffic Act, 1888.

The Court will consider not only the public interest in a competitive route, but also the right of a railway company to a long run in respect of traffic originating on its own system.

The Plymouth company applied, under section 25 of the Railway and Canal Traffic Act, 1888, for an order allowing through rates for goods traffic between the South-Western termini in London (Nine Elms and Waterloo) and Truro, Penzance and other stations on the Great Western railway in Cornwall, by way of Lidford and Plymouth North Road.

The applicants' line was a double line twenty-two miles in length, which ran from Lidford (where it joined the South-Western company's main line) to that company's station at Devonport, and was worked by the South-Western company. From Devonport the South-Western company owned a junction line with the Great Western main line (from London to Cornwall), and they had running powers over the latter to the Plymouth North Road station. The proposed exchange of traffic between the two companies was to take place at Plymouth North Road station.

Held, that the proposed route with an exchange at Plymouth North Road station was not a reasonable route.

THIS was an application to the Commissioners under section 2 of the Railway and Canal Traffic Act, 1854, and section 25 of the Railway and Canal Traffic Act, 1888.

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PERL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

The Plymouth, Devonport and South-Western Junction railway company gave written notice to the Great Western railway company and the South-Western railway company respectively, requiring them to receive and forward at through rates certain goods traffic from or to the South-Western railway company's stations and yards at Waterloo and Nine Elms in London, to or from certain stations (which included Truro; Falmouth and Penzance) on the Great Western railway in Cornwall mentioned in the said notice.

The route proposed was *via* Plymouth North Road, Ford and Lidford, and *vice versa*.

(Through fares for passengers from Waterloo to these stations in Cornwall by this route were also demanded.)

The Great Western railway company objected to the proposed through rates and fares and the apportionment thereof as being insufficient, and to the proposed route as not being a reasonable route.

The South-Western railway company objected to the amount and apportionment of the proposed rates and fares as being insufficient, but did not object to the proposed route.

Thereupon the applicants filed an application for an order—

- (1.) Allowing the through rates and fares and route proposed by the applicants and objected to by the Great Western railway company.
- (2.) Allowing the apportionment of the through rates as proposed by the applicants and objected to by the Great Western railway company and the London and South-Western railway company.
- (3.) Enjoining the Great Western railway company and the London and South-Western railway company, and each of them, to afford all reasonable facilities for the through traffic of the applicants, and to desist from giving an undue and unreasonable preference and advantage to their own proper traffic, so that no obstruction may be offered to the public desirous of using the railway of the applicants as part of a through line of communication.

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The answer of the Great Western railway company, so far as material, was as follows:—

The Great Western company deny that the through rates and fares referred to in the application are due and reasonable facilities in the interest of the public.

The applicants' only object in making this application is to divert traffic from the Great Western company's route to their own by means of active canvassing, although no advantage will be gained by traders who send by their route, but the proposed through rates and fares are not required in the interests of the public, and there is no traffic which the proposed route would better serve if the application were granted.

As regards merchandise traffic, no advantage will be gained by the public if through rates are put in force, either in the cost of, or the time occupied in, transit between the places mentioned in the application and London, or in any other way, and no traffic would pass that is not as cheaply and efficiently dealt with by the Great Western company in London as it could be by the London and South-Western railway company.

As regards passenger traffic, no better, quicker, or cheaper service will be given to Waterloo if the through fares are granted than that at present existing. The only difference would be that a passenger coming from or going to Waterloo would not require to take a fresh ticket at North Road station at Plymouth during the interval between the arrival and departure of the trains of the two companies.

The Great Western company have incurred, and are continuing to incur, a large capital expenditure to shorten and make more convenient the route between London and the stations in the West of England in order that the traffic may be conveyed in a more expeditious and satisfactory manner than has hitherto been possible. If any considerable amount of Cornish traffic is diverted and sent by the proposed route, the Great Western company will be deprived of traffic which was and is the object and inducement for such expenditure.

If the public interest requires that through fares and rates should be in force between Waterloo and Nine Elms and the places in Cornwall mentioned in the application (which the

Great Western company deny), the route proposed by the applicants is not a reasonable and convenient route for that purpose.

The through rates and fares which are proposed are not just and reasonable, and the amount proposed to be apportioned to the Great Western company is insufficient.

Balfour Browne, Q.C., and C. A. Russell, Q.C. (J. Shaw with them), for the applicants.

The South-Western route is over sixteen miles shorter to Nine Elms than the Great Western route to Paddington. It is a double line all the way. The route exists and there are traders in Cornwall who desire to use it. The South-Western can deal efficiently with the traffic if the through rates are granted. Similar traffic is now interchanged at North Road station.

C. A. Cripps, Q.C., and Asquith, Q.C. (Ernest Moon with them), for the Great Western railway company.

The Court is not debarred from considering the inevitable effect of competition; but the only elements of competition here are time and rates, in neither of which there would be any alteration to benefit the trader. The diversion of traffic for 200 miles from the Great Western company is an element for consideration in favour of that company. The South-Western company do not appear to support the impracticable interchange at North Road station, although they are joint owners and the responsible workers of the traffic.

The South-Western route from Plymouth to Exeter is six miles longer than the Great Western route. Exeter is the proper point of exchange.

W. J. Noble appeared for the London and South-Western railway company.

WRIGHT, J.: In this case the application is for a through route and rate practically from stations in Cornwall to South-Western stations in London by a particular route, and the route selected is the route *via* North Road station, which is the station selected by the applicants as the station for exchange, or transfer, by way of Lidford.

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—

A substantial body of evidence has been called here for the purpose of showing, and it does to some extent show, no doubt, that considerable benefit would accrue to the traders between Cornwall and London if there were an additional route not entirely under the control of the Great Western company, assuming it to be a proper route. In deciding these cases we have, both as a matter of common sense and as a matter of authority since the decision of the Court of Appeal in the *Didcot Case* ⁽¹⁾, to consider all the circumstances and all the facts in coming to a conclusion. For instance, on the one hand, we have to take into consideration that the Great Western company ought not, without some due cause in the public interest, to be deprived of the advantage of its long run in respect of traffic which has originated on its own system; on the other hand, we cannot disregard altogether, or, indeed, disregard at all, any benefit which might accrue to the traders, and to the public, from the exercise by us of the powers which the Act of Parliament authorises us to exercise. For instance, I, for one, should be inclined in a case of this sort to take very seriously into consideration, on the question of public interest, the fact that two competitive routes must tend to make either company more likely to give reasonable concessions to traders. Taking all those kind of matters into consideration, I think the applicants here have failed to make out that the route which they propose, with an exchange at North Road, is a reasonable route. That is the substance of the case, and we need not come to any determination upon any point except that.

The evidence appears to me to show beyond dispute that the route *via* North Road and Lidford as proposed, with an interchange at North Road, is not the proper route for the traffic to take. First of all, it is not the best route. It has not been seriously questioned that Exeter, for one part of the traffic, and Reading, for another part of the traffic, would be better points of exchange. Further than that, I think it has been conclusively demonstrated not only that North Road is not the best place, but that it is an impracticable place. Having regard to

(¹) *Ante*, p. 1.

the construction of the station there, which was constructed merely for passenger traffic, having regard to the bulk of the passenger traffic which passes through it, having regard to the time which must necessarily be occupied in exchanging trucks or transferring packages, and having regard to the large traffic to be dealt with in a station not designed for that purpose, it seems to me that we must come to the conclusion that it is not a practicable station, in any reasonable sense, for the interchange of traffic.

I have come to this conclusion with some regret, because obviously what is really desired by the bulk of the gentlemen who have come here is to inform the Court as to the public interest, as it is called, in a lower rate and better time than the time which they imagine the Great Western trains keep. That last grievance, however, is somewhat overstated, because one of the large traders told us that when Pickford's carts delivered traffic instead of Great Western carts, the goods always arrived in due time, which shows that, as far as he was concerned, the fault was not with the Great Western trains but with the Great Western carts.

There is one part of the case with regard to which I had some hesitation as to whether we should not hear something more about it, and that is the part of the application which deals with through rate and route for passengers. If that had been seriously pressed we should have desired to have gone further into the matter, but really it was only mentioned in a very casual way by one or two of the witnesses, and I do not think any serious case has been made as to that. I think the application fails on the one ground which I have mentioned.

SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitors for the applicants: *Burchell & Co.*

Solicitor for the Great Western railway company: *R. R. Nelson.*

Solicitors for the London and South-Western railway company: *Bircham & Co.*]

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Wright, J.

CARRICKFERGUS HARBOUR COMMISSIONERS AND OTHERS

v.

BELFAST AND NORTHERN COUNTIES RAILWAY COMPANY (¹).

Undue Preference of Ports—Benefit of Geographical Position—Group Rate—Coal Traffic—Charges disproportionate to Distance—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 7, 27, 29 and 30.

June 15, 16,
30, 1897.

Upon a complaint that the railway company did not in respect of coal traffic give the applicants or the traders of Carrickfergus the benefit of the geographical position of the port and harbour of Carrickfergus as compared with the ports of Larne and Belfast in relation to the several towns and places on the railway lying west and north-west of Carrickfergus.

It having appeared that the railway company had established uniform rates from the three ports of Larne, Belfast and Carrickfergus to certain inland towns, and that the effect of such group rates was that Carrickfergus sustained a loss of mileage advantage amounting to fourteen miles as against Larne in respect of the Cookstown and similar traffic.

Held, that so much of the complaint as related to the rates charged by the railway company for the conveyance of coal from the ports of Larne and Carrickfergus respectively to Ballyclare junction, to Antrim and the intermediate stations to Cookstown junction, and to towns and places on the railway between Cookstown junction and Cookstown and Draperstown respectively being the same, notwithstanding the distance the coal was carried from Carrickfergus was shorter than that from Larne, was true, and that the Carrickfergus traffic in coal was thereby subjected to an undue disadvantage.

Held further, that the rates for coal from Carrickfergus to the aforementioned towns and places must be lower than those from Larne to the same by the sum of 3d. per ton.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854, and section 30 of the Railway and Canal Traffic Act, 1888.

The applicants were the Harbour Commissioners of Carrickfergus and the Grand Jury of Carrickfergus. The latter were

(¹) Before GIBSON, J., and Commissioners Sir FREDERICK PHEL and Viscount CORHAM, sitting at the Four Courts, Dublin.

the owners of the Carrickfergus Harbour railway, which was a line of railway of about one mile, connecting the harbour with the Belfast and Northern Counties line. The application was that the Belfast and Northern Counties railway company should desist from unduly preferring the ports of (a) Larne and (b) Belfast, in respect of coal traffic to certain inland towns on their railway. These places divide themselves into (a) Ballymena and stations beyond that to the north, and (b) Ballyclare junction, Antrim, Cookstown junction, and stations beyond Cookstown junction to the west, on the line to Cookstown.

From all the three ports of Larne, Carrickfergus, and Belfast similar rates were being charged, although as regards stations on the Belfast and Northern Counties line between Larne and Cookstown junction (including Ballyclare junction and Antrim), Carrickfergus was nearer to them than Larne by about fourteen miles, and than Belfast by about four miles.

Ballymena was in a somewhat different position, owing to the existence of a narrow gauge railway to it from Larne, which belonged to the Belfast and Northern Counties railway company, and which was considerably shorter than the broad gauge route; the distance between Larne and Ballymena being about twenty-five miles by the narrow gauge and about forty-three miles by the broad gauge routes. The rates to Ballymena and stations beyond were charged on the basis of the narrow gauge mileage, though, as a matter of convenience, a considerable amount of traffic was taken round from Larne by the broad gauge line to avoid transshipment.

The result of this arrangement of grouping the rates from the three ports was that, with regard to the traffic to Ballymena and beyond, Carrickfergus obtained the advantage of some four miles and Belfast of some eight miles in the rate charged them.

It appeared from the evidence of the defendants' general manager, that before the narrow gauge line was made from Larne to Ballymena, the rates from Larne and Belfast to Ballymena were equal (although there was a difference of some ten miles in favour of Belfast) by an arrangement with the owner of Larne harbour, who threatened to make a competitive

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line. It also appeared that before the harbour line was made at Carrickfergus, there did exist a difference of 3*d.* in favour of Carrickfergus to all stations. It was shown that out of the present rate, 1*d.* was paid at Larne and at Belfast to the harbour authorities for the use of a harbour line, whereas at Carrickfergus 3*d.* or 4*d.* was charged; but this was apparently equalised by the question of haulage.

Sir Alexander Miller, Q.C.; The Macdermot, Q.C.; J. Stanley, Q.C. (R. F. Harrison with them), for the Belfast and Northern Counties railway company.

The onus of showing undue preference lies on the applicants, as they are not traders under section 27 of the Act of 1888.

The cartage at Carrickfergus used to cost 8*d.* per ton, so that the additional 3*d.* to the rate when the harbour railway was made was no hardship.

Want of accommodation at Carrickfergus harbour prevents vessels coming except at higher freights, so reduction of railway rates would have no effect on the trade. Loss of trade is not due to equality of rates between the ports, but to fault of defective harbour. Coal is now carried in larger vessels than formerly, which must use Larne or Belfast.

Where mileage rates exist (as on the line from Carrickfergus to Larne harbour), and to places where they are to the advantage of Carrickfergus, practically no coal is sent. In 1896, 293 tons of coal were carried from Larne to Carrickfergus itself. Traders have now the advantage of an equal rate with Larne to Ballymena, and stations north thereof, which they would no longer get if mileage rates were adopted, and yet they send next to no coal there.

The powers given by the Traffic Act of 1888 to "group," show that the Legislature must have contemplated that the mileage would be different in such cases.

On reducing the rate from Carrickfergus to Antrim and Cookstown, to a lower figure than the rate from Larne, the Great Northern railway will reduce their rate from Belfast to Antrim to the Carrickfergus figure. The result will be that Carrick-

fergus will be quite unable to compete with Belfast in that direction, and that Larne will be completely deprived of their present traffic, to the serious detriment of public and commercial interests.

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J. H. M. Campbell, Q.C., R. E. Meredith, Q.C. (E. H. Johns with them), for the applicants.

In addition to an initial difficulty of increased freight of from 3d. to 6d. to Carrickfergus as against Larne, Carrickfergus is by the present arrangement deprived of its fourteen miles advantage over Larne all along the line to Cookstown; in return for which it gets an apparent concession of four miles as regards Ballymena. Belfast cannot get the Larne traffic to Ballymena, no reduction to Carrickfergus can affect Ballymena, because of the existence of the narrow gauge line.

Even if the Great Northern railway should lower rates from Belfast to Cookstown, and traffic be thus transferred from Larne to Belfast, that is no justification for depriving Carrickfergus of its fourteen miles.

It is possible for Carrickfergus to get a substantial trade to Ballyclare junction, Antrim, and Cookstown. It is no answer to a charge of unequal treatment to say that Carrickfergus will not benefit by an alteration of rates.

The judgment of the Court was delivered by GIBSON, J.

GIBSON, J.: The complaint in this case on behalf of the Harbour Commissioners and Grand Jury of Carrickfergus is confined to rates for coal, and is brought under sections 7 and 30 of the Railway and Canal Traffic Act, 1888, to be considered in connection with sections 27 and 29. No question is raised as to the rates being intrinsically excessive. The complaint is entirely based on the allegation that the company, by establishing uniform rates from the three ports, Larne, Belfast and Carrickfergus, to certain inland centres, have subjected Carrickfergus to undue disadvantage, by depriving it of the benefit resulting from its superior proximity to such inland centres, and that its

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coal trade has been thereby extinguished. The evidence in support of the application was entirely that of Carrickfergus witnesses, and was mainly directed to the rates for traffic in the Ballymena and Cookstown directions. At the close of the case, the controversy was practically reduced to one point, the rates from Larne and Carrickfergus for the Cookstown traffic and other traffic similarly circumstanced. There was no substantial case made out as to the Belfast rates or the Ballymena traffic.

On behalf of the company, several answers to the application were put forward. Some of these may be summarily disposed of. The alleged difference of 3*d.* in favour of Carrickfergus as compared with Larne, when the expense of haulage is taken into account, practically disappears, and the rates are, as Mr. Cotton admitted, substantially identical. Again, the oral understanding between Mr. Chaine (as representing Larne) and Mr. Young, chairman of the company, that Larne should enjoy the advantage of equal rates—an understanding which related to a threatened competition only—was never embodied in any contract or statute, and cannot now in any event be allowed to prejudice Carrickfergus. Nor does the somewhat speculative contention that any change in the Carrickfergus rate would cause a complete diversion of the traffic without any possible benefit to Carrickfergus, commend itself to our judgment. The remaining points on which the company rely, and which have been carefully considered by us, are more substantial.

The first of these is that Carrickfergus, by the adoption of uniform rates, gets a certain amount of advantage, particularly in the case of Ballymena, and Northern traffic, and that this benefit must be taken into account in estimating the operation of the system as a whole.

The actual mileage on the company's broad gauge line is much longer from Larne than from Carrickfergus, and all coal consigned north of Ballymena is dispatched by the circuitous broad gauge route, in order to avoid the inconvenience and loss caused by transhipment at Ballymena. The narrow gauge line, however, between Larne and Ballymena is four miles shorter in favour of Larne as compared with Carrickfergus, and it is stated that the tariff for this shorter route controls and has reduced

the rate on the circuitous broad gauge transit. In this point of view, Carrickfergus may be said to get an advantage, while Larne loses the benefit of its shorter mileage. The gain, however, which Carrickfergus may derive from this, though it must be considered, can hardly be accepted as balancing the loss of mileage advantage, namely fourteen miles, which Carrickfergus sustains in respect of the Cookstown and similar traffic.

The main point in dispute, to which most of the evidence on both sides has been addressed, is as to the decline of the Carrickfergus coal trade, which the applicants attribute altogether to the unfairness of the system of uniform rates—in force since 1878—but which the company contend is accounted for by other causes. The evidence is largely based on tables of traffic, prepared on behalf of the applicants and the railway company respectively.

The applicants' tables show (a) the quantity of coal sent by rail from Carrickfergus for the year 1890 and following years; (b) the quantity of coal landed in Carrickfergus. The former table for some reason passes over the years 1888 and 1889, the period immediately following the opening of the junction railway with the main line, and omits to disclose the inland towns to which the coal was dispatched. It shows a rapid downward movement from 1890 to 1894, when the quantity is lowest, followed by a rise in 1895, with a further decline in 1896. The quantities sent inland during the years 1894, 1895 and 1896, are very similar to those which, according to the company's returns, were consigned in the years 1884, 1885 and 1886, ten years before.

The second table shows since the year 1890 an increased shipment of coal to Carrickfergus. This coal must have been used in local trade, which the Carrickfergus merchants say is the more profitable. It appears that a large salt industry has grown up in the district, and the suggestion of the company is that the coal which was formerly dispatched by rail is now retained for the more advantageous home trade.

Neither of the applicants' tables gives any account of the Larne trade, which is alleged to have been unduly favoured at the expense of Carrickfergus.

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The returns supplied on behalf of the company omit, like those of the applicants, the years 1888 and 1889, and relate to the years 1884, 1885, 1886 and 1896. Ballymena in 1896 bought very much the same respective quantities from Belfast, Larne, and Carrickfergus as are shown during the triennial period. Nor is there much of a difference between the two periods as far as regards the sales from the three ports to Cookstown, save that the trifling consignments coming from Carrickfergus during the earlier period disappear altogether in 1896. The figures point to an unprogressive business, with rather a drooping tendency. They supply no support to the view that Larne has captured the trade which Carrickfergus has lost. The principal development of the Larne traffic has been in the Ballymena direction.

The traffic returns for other towns, such as Randalstown and Magherafelt, show how difficult it is to refer vicissitudes of business to the operation of the railway tariff. Thus the Carrickfergus business with these towns shows on the railway tables in 1896 a large proportional increase over the year 1886, while Larne presents a small proportional gain, and Belfast a marked falling off.

The railway company contend that the decline or inelasticity of the Carrickfergus coal traffic is mainly caused by the natural disadvantages of the harbour, which is tidal, shallow and insufficiently equipped. There is, probably, much truth in this, and it is admitted that the sea freights to Carrickfergus are from 3*d.* to 6*d.* per ton over those to Larne or Belfast. If this disparity were removed, Carrickfergus could (one witness says) compete successfully for the inland trade. It could not be contended that the railway rates ought to be adjusted so as to compensate for the higher sea freights; but it is not unreasonably argued that, handicapped as it is by nature, Carrickfergus ought not to be deprived of any advantages to which its geographical position may entitle it.

There is naturally a good deal of exaggeration on this point on both sides. The result of the evidence appears to us to be that though traffic of very considerable volume could not be accommodated without very extensive and costly changes, a

trade much larger than at present exists could be managed and dealt with at Carrickfergus. The suggestion that the nature of the harbour arrangements makes any expansion of trade impossible cannot be accepted.

On behalf of the company, it was further urged that the public interest required the continuance of the present system of uniformity which has been now tested by many years' experience. Extensive coal merchants from Ballymena, Antrim and Cookstown have been called to support this view, and no corresponding evidence has been adduced on behalf of the applicants to show that public interest will be served by reducing the Carrickfergus tariff. This circumstance is important. At the same time, these witnesses admit that there was once a large coal business with Carrickfergus, which has since died out. If any fair adjustment of rates is possible, which would enable Carrickfergus to compete without substantially diminishing the force of the Larne competition, it is not easy to see how the interests of the inland towns could be thereby prejudiced.

On the whole, looking at the marked difference of mileage (which, though not decisive, is an important factor), and taking all the circumstances of the case into consideration, we have arrived at the conclusion that the present system of uniform rates, as to certain parts of the traffic, places Carrickfergus to some extent at an undue disadvantage as compared with Larne; and that, without an undue reduction of rates, and without detriment to the interest of the public, the coal rates from Carrickfergus (1) to Ballyclare Junction, (2) to Antrim, and (3) to Cookstown Junction and beyond in the Randalstown direction, ought to be lower than the coal rates to the same places from Larne by the sum of 3*d.* per ton.

The application so far as relates to Belfast and to the Larne rates with Ballymena and northwards fails, and must be refused. There will be no costs.

[Solicitors for the applicants: *W. & D. Johns*, Belfast.]

Solicitors for the railway company: *Torrens, Sons & Bristow*, Belfast.]

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NORTH BRITISH RAILWAY COMPANY ⁽¹⁾.

*Appeal from Railway Commissioners—Competency of—Running Powers—
Interim Injunction—Regulation of Railways Act, 1873 (36 & 37 Vict.
c. 48), s. 8—Railway and Canal Traffic Act, 1888 (51 & 52 Vict.
c. 25), s. 17.*

January 6, 7,
26, 27, 28,
March 10,
April 28,
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Where the Railway Commissioners sit in lieu of arbitrators under the provisions of section 8 of the Regulation of Railways Act, 1873, they exercise a jurisdiction not depending on the consent of the parties, and an appeal will lie under section 17 of the Railway and Canal Traffic Act, 1888, to a superior court on a question of law. (So held by the Court of Session.)

The Railway and Canal Traffic Act, 1888, section 17, enacts that "no appeal shall lie from the Commissioners on a question of fact . . . save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal."

Held (by the Court of Session), that an appeal is competent against an order of the Commissioners, if it appears from the judgment of the Commissioners (although not in the order itself) that in arriving at the result expressed in the order they had first decided a question of law.

By an agreement entered into between the North-Eastern and North British railway companies, scheduled to an Act of Parliament, it was provided that "for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow and other places in Scotland, the North British company shall at all times hereafter permit the North-Eastern company, with their engines, &c., to run over and use the North British company's railway . . . between Berwick and Edinburgh . . . subject to the payment by the company to the North British company for such user of such tolls, rates . . . as have or has been, or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration."

The North-Eastern company applied to the Commissioners, under section 8 of the Regulation of Railways Act, 1873, for an order allowing them, in the exercise of their running powers, to run between Edinburgh and Berwick the full number of passenger trains required for the conveyance of passenger traffic

⁽¹⁾ Before Lord TRAYNER and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

between England and Scotland by the East Coast route. The Commissioners decided that the North-Eastern company were entitled to run one-half of the through passenger trains (for the conveyance of traffic between England and Scotland) over the railway of the North British company between Berwick and Edinburgh on the terms of the North-Eastern company paying to the North British company 75*l.* per cent. of the gross receipts, and retaining 25*l.* per cent. for working expenses, and that the payment of such 75*l.* per cent. by the North-Eastern company should include the payment by way of rent for station accommodation and station services at Edinburgh under the agreement.

Lord Trayner held that it was legally impossible to grant the application of the North-Eastern company in respect that the North British company, as owners of the line between Edinburgh and Berwick, were entitled as matter of legal right to run some, at least, of the through trains. On appeal.

Held (by the Court of Session), that the fact that the North British company were the owners of the line between Berwick and Edinburgh, did not of itself entitle them as of right, to run some of the through trains in dispute, and did not preclude the Railway Commissioners from granting, if they saw fit, the application of the North-Eastern company.

Application for an *interim* injunction refused by the *Ex officio* Railway Commissioner for Scotland.

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THIS was an application by the North-Eastern railway company, under section 8 of the Regulation of Railways Act, 1873, and section 15 of the Railway and Canal Traffic Act, 1888, for an order determining certain differences between that railway company and the North British railway company.

The nature of these differences appears from the application, which was as follows:—

“1. The railway of the applicants, which extends from near Doncaster to Berwick, is connected with the railway of the Great Northern railway company near Doncaster, and with the railway of the respondents at Berwick, the railways of the three companies forming a continuous line of communication between London and other places in England and Edinburgh and other places in Scotland, which is known as ‘the East Coast route.’

“2. By an agreement dated 14th May, 1862, made between the applicants and respondents, which was scheduled to and confirmed by the North-Eastern and Carlisle Railways Amalgamation Act, 1862, and in which the applicants are referred to as ‘the company,’ and the respondents as ‘the North British company,’ it was provided (*inter alia*) as follows:—

‘8thly. For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick, for all traffic between London and other

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places in England, and Edinburgh, Leith, Glasgow and other places in Scotland, the North British company shall at all times hereafter permit the company, with their engines, carriages, wagons, and trucks, to run over and use the North British company's railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering places, and other conveniences at and between Berwick and Edinburgh and Leith, all inclusive, subject to the payment by the company to the North British company for such user of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement as shall be fixed by arbitration in manner hereinafter provided.

'9thly. The North British company shall afford to the company proper and sufficient station accommodation for passenger traffic at Edinburgh, and Berwick, except that at Berwick they shall not be required to give the use of the station for fish carried by passenger trains unless carried as parcels; provided that the company shall use the Berwick station for all their passenger trains, whether from or to the southward or westward, which from time to time stop at Tweedmouth.

'10thly. The North British company shall afford the services of their booking clerks, porters, and other servants at those stations for the passenger traffic of the company, but the company, if and when they think fit, may provide at their own cost their own booking clerks, porters, and other servants at those stations, or any of them, and in the event of their so doing the North British company shall provide thereat proper and sufficient accommodation for the booking clerks, porters, and other servants so provided.

'11thly. The trains of the company shall be permitted to take up and set down passenger traffic at any intermediate stations between Edinburgh and Berwick going to or from the company's railway, and the North British company's clerks shall book that traffic at those stations,

but the company, if and when they think fit, may employ their own servants at any of those stations at their own cost, and in the event of their doing so the North British company shall provide thereat suitable accommodation for the servants so employed.

‘12thly. The company shall pay to the North British company a reasonable rent for the user of the station accommodation so provided, and a reasonable charge for the services of the booking clerks, porters, and servants of the North British company so rendered at their terminal stations at Edinburgh and Berwick, but shall not be liable to make any payment to the North British company for the use of and for like services so rendered at any of the intermediate stations.

* * * * *

‘17thly. If and whenever any dispute or difference shall arise between the company and the North British company as to facilities or accommodation to be given, or as to any rent or charge or allowance (terminal or otherwise) to be paid or allowed by either company to the other under this agreement, every such difference shall be determined by arbitration under the Railway Companies Arbitration Act, 1859; each or either of the company and the North British company may by not less than three months’ notice in writing to the other of them, ending with any or every fifth year from the time at which any such rent or charge or allowance is first determined, require that it shall be revised, and it shall be revised accordingly, but the rent or charge or allowance to be revised shall continue payable until it be altered on the revision; and every such revision, if not otherwise agreed on, shall be made by way of arbitration under the Railway Companies Arbitration Act, 1859.’

“3. By the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act, 1865, after reciting that the railways of the applicants and the Great Northern railway company (in that Act called ‘the East Coast companies’) formed continuous portions between London and Berwick of the East

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Coast route, and that the applicants had acquired rights of running and carrying traffic to and from Berwick over the North British railway between Berwick and Edinburgh, and that it was expedient that nothing should be done which should impede or obstruct the flow or transit of traffic of every description from and to Glasgow, Fifeshire, and other places in Scotland over the railways of the North British and Edinburgh and Glasgow companies to and from those of the East Coast companies freely and expeditiously as theretofore, it was enacted (*inter alia*) as follows:—

‘44. The North British company shall carry and forward all East Coast traffic over the North British lines and the railway of the company between Berwick and Edinburgh as regularly and expeditiously as they from time to time carry and forward traffic of a similar description over any portion of their railways, and shall, as regards that going south, so deliver the same at Edinburgh or Berwick as may be required by the East Coast companies, or either of them, in order that it may thence be forwarded to or carried by the East Coast companies, or either of them, as the case may require, and as regards that going northwards or westwards when and as such traffic shall be delivered at Berwick or Edinburgh, as the case may be.’

“By section 50 of the said Act, running powers were conferred upon the applicants and the Great Northern railway company over the railways of the respondents northwards or westwards of Edinburgh except their railways north of the Forth.

“4. In 1869 the applicants gave notice of their intention to exercise the running powers conferred on them by the said agreement of 14th May, 1862, between Berwick and Edinburgh for passenger traffic, and since that time the whole of the through trains to or from Edinburgh from or to London and other places in England by the East Coast route have been worked between Berwick and Edinburgh by the engines and servants of the applicants except the train departing from Edinburgh at 6.25 p.m. and arriving at Berwick at 7.39 p.m., which was put on for the first time in November, 1895, and

which has been worked by engines and servants of the respondents with the acquiescence of the applicants pending the issue of certain legal proceedings between the two companies. The terms and conditions upon and subject to which the said through trains have been run were arranged between the applicants and the respondents. This arrangement was terminated on the 30th April, 1895, but has been continued (subject to certain modifications) as an interim arrangement until the 14th January, 1897.

“5. The applicants have given notice to the respondents that they intend to exercise their said running powers and to continue to run a full service of through passenger trains between Edinburgh and England by the East Coast route. The times at which the applicants propose to run such trains are set out in the schedule to this application, and they propose to pay to the respondents in respect of the exercise by the applicants of their running powers between Edinburgh and Berwick sixty-six and two-thirds per cent. of the receipts arising from such trains as between Edinburgh and Berwick. The respondents have refused to accede to the company’s proposal, and the applicants and the respondents have failed to agree as to the times at which and the terms and conditions upon and subject to which the running powers of the applicants are to be exercised.

“6. The applicants apply to the Court under section 8 of the Regulation of Railways Act, 1873, and section 15 of the Railway and Canal Traffic Act, 1888, for an order determining the aforesaid differences, no arbitrator having in any general or special Act been designated by his name or by the name of his office, nor any standing arbitrator appointed under any general or special Act.”

Appended to the application was a schedule setting forth the trains.

The answer of the North British company, so far as material, was as follows:—

“2. By another agreement between the applicants (hereinafter called the North-Eastern company) and the respondents (hereinafter called the North British company) dated 12th May, 1862, which proceeded on the preamble that a Bill was then

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pending in Parliament entitled 'A Bill for the Amalgamation of the Undertaking of the Newcastle-upon-Tyne and Carlisle Railway Company with the Undertaking of the North-Eastern Railway Company, and for other purposes,' that the North British company had petitioned Parliament against the said Bill, and that the parties to the agreement were both interested in the cultivation and development and free interchange of the traffic between their respective systems, it was agreed, *inter alia*, as follows:—

'Eighteenth. That the North-Eastern railway company and the North British railway company shall maintain and work in full efficiency in every respect the East Coast route *via* Berwick for all traffic between London and other places in England and Edinburgh, Leith, Glasgow and other places in Scotland, and, so far as the parties hereto have power, through fares and rates for all kinds of traffic, exchange of rolling stock, and all facilities which either of the parties hereto can legally afford shall be adopted and carried out on such route for the cultivation and development of such traffic * * *'

"3. The North British and Edinburgh and Glasgow Railway Companies Amalgamation Act, 1865, mentioned in Article 3 of the application, is referred to for its terms. It is admitted that by that Act the running powers of the North-Eastern company were extended over most of the railways of the North British company south of the Forth, and by subsequent statutes said powers have been applied to most of the North British railways north of the Forth. The North-Eastern company have now running powers over the railways of the North British company between Berwick and, amongst other places, Edinburgh, Glasgow, Perth, Dundee and Arbroath, and over the railways of the Caledonian railway company between Larbert and Stirling, Perth and Aberdeen.

"4. Besides the North-Eastern company, several other English railway companies possess extensive running powers over railways in Scotland. The Great Northern railway company have running powers in Scotland over large portions of the North British railways, including the railways between Edinburgh and Glasgow, Perth, Dundee and Arbroath, and

also over the Caledonian railways between Larbert and Stirling, Perth and Aberdeen. The Midland railway company have running powers over the North British railways between Carlisle and, amongst other places, Edinburgh, Larbert, Perth, Dundee and Arbroath, and over the railways of the Caledonian railway company between Carlisle and, amongst other places, Glasgow, Perth, Dundee and Aberdeen. The London and North-Western railway company have running powers over the Caledonian railways between Carlisle and, amongst other places, Edinburgh, Glasgow, Perth, Dundee and Aberdeen. These running powers are all unexercised. No English railway company exercises running powers in Scotland.

"5. The East Coast route between London and Edinburgh was completed and opened in 1848, and from that time down to 1st June, 1869, all East Coast trains were worked by the North British company on their own line to and from Berwick. At Berwick, the East Coast trains for the South were handed over by the North British company to the North-Eastern company; and the East Coast trains for the North were handed over to the North British company by the North-Eastern company. No difficulty was ever raised as to the granting of mutual facilities at Berwick, through bookings, through carriages, and through continuous and convenient trains.

"6. It is admitted that on 10th May, 1869, the North-Eastern company gave notice of their intention 'to commence running some of their trains to and from Edinburgh on the 1st of June,' 1869—the said trains being, as stated by them, two new trains per day each way in addition to the North British company's previous regular service of trains. These two trains each way per day were run by the North-Eastern company from 1st June, but by agreement between the two companies, dated 27th July and 7th August, 1869, it was arranged that the said trains as from 1st June, 1869, should not be dealt with as running-power trains, but as run in terms of said agreements, and for all purposes of division of receipts it was agreed that the said trains were to be held as not having been running-power trains. Since July, 1869, the North-Eastern company have not exercised their running powers. It is admitted that since August,

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1869, almost all the through trains between Edinburgh and places south of Berwick have been hauled by engines of the North-Eastern company, the North British company paying to the North-Eastern company for their haulage engine hire at a fixed rate per mile run. That arrangement was embodied in Minutes of Meetings held in 1869, and was terminable on three months' notice, and was in fact terminated on the 30th April, 1894.

"7. On the termination of the arrangement in question on 30th April, 1894, the North-Eastern company took up the position that the whole East Coast through trains had since August, 1869, been their trains while upon the line of the North British company between Berwick and Edinburgh, as well as while upon the North-Eastern company's own railway between Berwick and York, and claimed the right to run the whole East Coast through trains upon the line of the North British company between Berwick and Edinburgh as running-power trains of the North-Eastern company, basing their right to do so upon the fact, as they alleged, that since 1869 the whole of said trains had been their running-power trains. This contention of the North-Eastern company the North British company disputed, and, in order to have the question determined, adopted legal proceedings against the North-Eastern company. In these proceedings a final judgment was delivered by the House of Lords on 14th December, 1896⁽¹⁾. The opinions of the Lords are herewith produced and referred to, and they are to the effect, *inter alia*, that—

(1) The East Coast through trains have not since 1869, while on the railway of the North British company between Edinburgh and Berwick, been trains run by the North-Eastern company in the exercise of their running powers.

(2) On the termination, in April, 1894, of the engine-hire arrangement before mentioned, made in 1869, the parties were restored to the *status quo ante* existing prior to 1869.

(3) The North-Eastern company are not entitled, as

⁽¹⁾ *North British Ry. Co. v. North Eastern Ry. Co.*, 24 S. L. R. (H. L.) 19.

pleaded by them in the litigation in question, to run such number of East Coast trains between Edinburgh and Berwick as appeared to them to be necessary or advisable; and

(4) The North-Eastern company have no exclusive right to run the East Coast trains between Edinburgh and Berwick.

While the question between the parties as to whether the East Coast trains were or were not running-power trains of the North-Eastern company was *sub judice*, the engine-hire arrangement was from time to time continued, and is to continue as an interim arrangement until the 14th January, 1897.

"9. The proposal of the North-Eastern company, as set forth in the application and schedule, is to convert, by order of this Court, the whole East Coast through trains, which by mutual arrangement and agreement between the North British company, the North-Eastern company, and the Great Northern railway company have been duly announced and advertised to run for the month of January next, from being trains of the North British company on their own line between Berwick and Edinburgh into running-power trains of the North-Eastern company. The North-Eastern company claim the right to capture the owning company's whole existing trains between Edinburgh and Berwick, except four daily local trains each way, and to practically oust the North British company from their own line, confining them to local traffic. The North British company respectfully submit that they should not be ordered by this Court to permit the carrying out of any such proposal.

"10. In terms of the agreement of 12th May, 1862, above mentioned, the North-Eastern company are under obligation to the North British company to maintain and work along with them, in full efficiency in every respect, the East Coast route *via* Berwick, with through fares and rates, and to exchange rolling stock with the North British company at that station, and to afford to the North British company's traffic and trains at Berwick all facilities which the North-Eastern company can legally afford. The said facilities include the forwarding as

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"11. In the event of the Court determining to order the North British company to permit the North-Eastern company, in the exercise of their running powers, to run between Edinburgh and Berwick any of the trains set forth in the schedule to the application, the North British company submit that they should receive not less than eighty per cent. of the receipts arising from such trains as between Edinburgh and Berwick, and that for each train run to, and for each train run from,

Edinburgh, by the North-Eastern company in the exercise of running powers, they should be ordered to pay to the North British company an annual sum of not less than 600*l.* by way of rent for station accommodation at Edinburgh, and services there of clerks, porters, and other servants to such train or trains, and passengers and traffic carried by such train or trains, and proportionately for any part of a year."

Before the case came on for hearing the North-Eastern company served the following notice of motion for an interim injunction :—

"Take notice that the applicants intend to move, &c. for an interim injunction enjoining the respondents, until the hearing of the case, to permit the applicants with their engines and carriages to run over and use the railway, sidings, stations, wharves and stopping places, water, watering places, and other conveniences between Berwick and Edinburgh, and fixing the times of the trains to be run by the applicants over the said railway until the hearing of the case and the payment to be made by the applicants to the respondents for the user of the said line in respect of such trains, or in the alternative for an interim injunction prohibiting the respondents until the hearing of the case from doing anything to obstruct or interfere with the East Coast service of trains as at present worked by the applicants between Berwick and Edinburgh or between Edinburgh and Berwick."

The motion for such injunction was heard by Lord Trayner, who delivered the following judgment :—

LORD TRAYNER : The North-Eastern railway company are at present (in conjunction with the Great Northern railway company) running certain trains daily from London to Edinburgh, and *vice versa*, and in doing so necessarily pass along the railway belonging to the North British company between Berwick and Edinburgh. These trains are run at present under an agreement between the companies, which expires in a week's time; and the North British company have given notice that they will not continue the agreement after that date. The North-Eastern railway company claim to have running powers

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over the North British company's line, and have made an application to the Railway Commissioners for an order under which such running powers will be rendered available. But pending the decision of the Commissioners upon that application, a motion has been made to me to grant an order or injunction whereby the North British company may be restrained from interfering with or changing the arrangements under which the North-Eastern company's trains at present run until the application I have mentioned is disposed of. In effect I am asked to grant an order which would compel the North British railway company to continue an agreement into which they voluntarily entered, and from which they are, by the terms of the agreement, entitled to withdraw. The motion was supported on three grounds:—(1) That the continuance of the present arrangement would not prejudice the North British company; (2) that its discontinuance would prejudice the North-Eastern company; and (3) that its discontinuance would result in great public inconvenience. I cannot give any effect to the first and second of these grounds. If the North British company are only exercising their legal rights (and as matters stand that can scarcely be disputed), it is not for me to consider whether such exercise is beneficial or the reverse to them; nor is it any reason why the exercise of their legal right should be interfered with, because such exercise precludes some one else from a benefit he might otherwise obtain. The third ground would have had considerable weight with me had I been satisfied that it is well founded, as matter of fact. But I am not satisfied of that. I see no necessity for public inconvenience arising from the position now maintained by the North British company. They undertake, so far as they are concerned, that all the through trains now running shall be taken to and from Berwick, so that no more time will be occupied in the going from Edinburgh to London or London to Edinburgh than at present. If that is done no public inconvenience will be occasioned. I understand, further, from the counsel for the North British company that that company is willing in the meantime to allow the present arrangement to continue in reference to the three trains now running between Edinburgh and London which are not

timed to stop at Berwick. I think this was a very reasonable and proper concession to make. I therefore refuse the motion for the North-Eastern company.

The case was subsequently heard on the merits before the Commissioners.

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Guthrie, Q.C., Salvesen, and A. O. Mackenzie, appeared for the North-Eastern railway company.

Dean of Faculty (Asher, Q.C.); Solicitor-General (Dickson, Q.C.), and Grierson, appeared for the North British railway company.

The arguments of counsel are fully stated in the judgments of the Commissioners, which were as follows:—

LORD TRAYNER: The main questions to be determined under this application are the extent to which, and the conditions under which, the North-Eastern company are to be allowed to exercise their running powers over the railway belonging to the North British company between Edinburgh and Berwick. That railway forms a part of what is known as the East Coast route between Edinburgh and London, the other parts of which belong to the North-Eastern company and the Great Northern company respectively. In the application presented to us, the applicants state that they intend, in exercise of their running powers, to run a full service of through passenger trains between Edinburgh and England by the East Coast route; that the times at which they propose to run such trains are set out in the schedule appended to the application; that the defendants have refused to accede to this; and they practically ask an order from us which will enable them to carry out their intention. From the schedule it appears that the trains which the applicants propose to run are the whole through trains at present running between Edinburgh and London, departing and arriving at the respective termini at the hours now observed. Put more briefly (as indeed it is put by Mr. Gibb, the manager of the North-Eastern company in his evidence), what the applicants ask is an order from us which will have the effect of giving to the applicants the control of all the trains which now

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constitute the service by the East Coast route between Edinburgh and London. The grounds, at all events the principal grounds, on which the applicants maintain that the application should be granted are (so far as I can gather from the proof adduced and the arguments addressed to us) these three— (1) their legal right; (2) the practice of other railways; (3) that the defendants have an interest which may operate adversely and prejudicially to the interests of the East Coast route. I take the second and third of these grounds first, as they can be easily disposed of.

I. With regard to the practice of other railways, it is probably the case that in England, the company possessing the running powers does, as matter of fact, control the through traffic, does all the haulage, arranges the hours for the arrival and departure of trains, and so on. But they do not do so as matter of right. In any case we have heard of, such an exercise of running powers is under agreement between the company who are owners of the line and the company having the running powers. But what certain companies agree upon is no criterion of the rights, and cannot affect the rights, of other companies who do not agree. It would be unreasonable to hold that the North British company are bound to accept a limitation of their legal right, because certain English companies have agreed (under circumstances and upon terms of which we are ignorant) so to limit their rights. I dismiss that ground, therefore, from my consideration as having really no relevant bearing upon the questions now before us.

II. The interest which it is said or suggested that the North British Company have adverse to that of the East Coast route is their line by the Waverley route from Edinburgh to Carlisle. This is longer than the line from Edinburgh to Berwick by about 40 miles, and the suggestion is that the North British Company, in order to earn the profit which their longer mileage would give them, may send through passenger traffic by Carlisle (and thence by the Midland railway to London) instead of sending it by the East Coast route. This, of course, is possible, in the sense that the North British Company might try to do so, but it has never been done, and the applicants do not say it

has ever been done. All that the applicants do say is, that the North British company have used this possibility as a ground for declining to join in the expense of advertising the East Coast route as the applicants wish to advertise it, and as a means of obtaining a bonus from the applicants. I take this statement (subject to Mr. Conacher's explanation) as correct. But it only comes to this, that the North British company have used a position they possess as a means of obtaining from the applicants better terms than they would otherwise have obtained. It does not suggest to my mind, far less establish as a fact, that the North British company have ever done, or threatened to do, anything to interfere with the development of the East Coast route. Mr. Conacher's evidence is that "The North British company have always recognized that it was vital to their position in Scotland, as against the West Coast route, to do their very best for the East Coast route, and they have co-operated with the other companies (*i.e.* the applicants) in every way they could to improve the service." There is no evidence to the contrary of this. In acting as Mr. Conacher describes, the North British company have only been doing what is best for themselves, and in that fact is to be found the best guarantee for the continuance of the same co-operation. The idea of the North British company starting or maintaining a route from Edinburgh to London, by way of Carlisle, and thence by the Midland railway, in opposition to either the East or the West Coast route, would not be entertained seriously by any one at all acquainted with the passenger traffic between Edinburgh and London. And, indeed, I think the applicants do not seriously apprehend any risk of that happening which they suggest might happen. At any rate, they have cried out, not only before they were hurt, but before they had any real apprehension that they were likely to be hurt. I am of opinion that there is no evidence to support the view that the North British company have failed in any way loyally to co-operate with the applicants in making the East Coast route as efficient and as attractive as it could be made.

I have probably given this ground for the application more consideration than it deserves, but I proceed now to consider the

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remaining ground, What are the legal rights of the applicants? And in reference to that question neither the facts nor the law appear to me attended with difficulty.

III. In May, 1862, the North-Eastern company and the North British company entered into an agreement whereby (section 18) it was provided that the parties thereto should maintain and work in full efficiency in every respect the East Coast route for all kinds of traffic, and that all facilities which either of the parties could legally afford should be adopted and carried out on such route for the cultivation and development of such traffic; further, that the North British company should grant to the North-Eastern company running powers over the line from Berwick to Edinburgh. It was also agreed that a clause for giving full effect to and for rendering binding in perpetuity that portion of the section just referred to, giving running powers to the North-Eastern company, should be inserted in a bill then before Parliament. Accordingly, in a schedule to the North-Eastern and Carlisle Amalgamation Act, 1862, we find the following clause:—"Eighthly, For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British company shall at all times hereafter permit the company (*i.e.* the North-Eastern company) with their engines, carriages, &c., to run over and use the North British company's railway, &c., between Berwick and Edinburgh," &c. When that Act was passed, matters stood thus between the two contracting companies: The North-Eastern company had running powers over the railway between Berwick and Edinburgh—this was statutory; and the North British company, under agreement, were entitled to demand and get every facility from the North-Eastern company which the latter could legally afford for the forwarding, to the south, of any traffic which the North British company might take to Berwick. The practical difference between their positions was that, whereas the North-Eastern company were entitled under their running powers to go over the North British company's line with their engines and

carriages, and so convey the traffic from the south of Berwick to Edinburgh, the North British company could not enter upon the North-Eastern company's line with traffic conveyed from Edinburgh to Berwick; but could only ask the North-Eastern company to take that traffic on. In short, the North-Eastern company could convey traffic from south of Berwick to Edinburgh, but the North British company had to give up their traffic from the North to Berwick at the latter station to the North-Eastern company.

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That being the state of matters between the parties, the first question that requires to be attended to is the argument maintained by the counsel for the North British company on the effect of the eighth article of the agreement scheduled to the Act of 1862. It was argued by him that that clause only gave the North-Eastern company a right to exercise the running powers "for the purpose of maintaining and working in full efficiency in every respect the East Coast route;" that unless it was necessary "for that purpose" the running powers could not be exercised; that it was not in fact necessary for that purpose that the powers should be exercised, as the North British company were willing and able to work efficiently the traffic of the East Coast route from Berwick to Edinburgh. There is no serious dispute regarding the matter of fact. I assume that the North British company are quite able and willing to work efficiently the traffic between Berwick and Edinburgh. But, nevertheless, I regard the argument as unsound. In the first place, the North-Eastern company are not desiring to exercise their running powers for any other purpose than that for which such powers were given to them. They seek to exercise their powers solely with the view of maintaining and working the East Coast route in full efficiency. In the second place, it is no reason for preventing the North-Eastern company from exercising their right that the North British company is willing to do the work for them. For reasons satisfactory to themselves, the North-Eastern company prefer to do their own work rather than allow it to be done for them by others. And in the third place, the argument for the North British company can only proceed on the assumption of a limitation of the North-Eastern

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company's right, which is not imposed by the agreement scheduled to the Act of 1862. That agreement does not make the exercise of the running powers thereby conferred conditional upon the North British company being unable to do what under the running powers the North-Eastern company are authorized to do. On the contrary, both the private agreement and the scheduled agreement proceed upon the view that both companies are able and bound to maintain in their own respective portions of it the efficient working of the East Coast route, concurrently with the exercise or possible exercise of the running powers. I have no doubt, therefore, that the North-Eastern company are entitled to exercise their running powers over the North British company's railway, although the latter company are able and willing to do what would make such exercise unnecessary.

The question, however, remains—To what extent are the North-Eastern company entitled to exercise their running powers? The views of the North-Eastern company on the subject are stated with unmistakable clearness by Mr. Gibb, their manager. He says :—"In the present application we propose to run nine trains the one way and ten the other at times which are set out in the schedule to the application. That will constitute a full service of trains meeting fully the wants of the public." If the North-Eastern company are authorized to run all these trains—"a full service meeting fully the wants of the public"—it follows that the North British company will not be able to run any of the through trains at all; there would be no need, and, indeed, no room for other trains. Accordingly, the result of granting the application now before us would be to prevent the North British company from using their own line at all, so far as through traffic is concerned, between Edinburgh and Berwick. I know of no principle of law or good sense upon which effect could be given to such a claim. The North British company are the owners of the line, and entitled as owners to the fullest use and enjoyment of their own property which the law permits. They are not the less absolute owners of their line because the North-Eastern company have running powers over it. The right of the North British company is

that of ownership—the right of the North-Eastern company is the inferior right of servitude, and it is to me a novel view to maintain that the owner of a servitude can use, or claim to use, the subject over which his right extends to the exclusion of the owners of the subject. Take a familiar example. A road, the property of A., is subject to a right of passage thereon to B. The first principle in reference to the subordinate right is that it shall be exercised in the manner least burdensome to the superior right. But if the owner of the servitude proposed to use his right so as to practically exclude the owner of the road altogether, or to exclude a particular use thereof by the owner, or the use thereof altogether during certain hours of the day, the principle I have referred to would be subverted. That would not be using the servitude in the least burdensome fashion, but would be making it as burdensome as possible. It would in effect, on the one hand, be conferring on the servitude holder the benefits of ownership, and, on the other, reducing the right of ownership to a very limited right of servitude. I cannot give effect to such a contention. To do so would, in my opinion, be something a great deal more than regulating the use of co-existing rights; it would be an unwarrantable invasion of the rights of the North British company. I am not to be understood to say that the Court could not, under any circumstances, grant such an application as that now before us. I can conceive circumstances under which it might, as, for example, if the North British company were unable to work the through traffic efficiently—or refused to do it—or were clearly acting in such a way as to injure the East Coast route, which it had bound itself to maintain and work. Probably, in such circumstances, the Court might interfere. But in the circumstances of the case before us, I am clearly of opinion that the Court cannot grant this application as made, because, by so doing, they would be depriving the North British company of the proper and legitimate use of their own property; in short, doing it a wrong.

The North-Eastern company has not asked us to consider any alternative scheme, such as a division or apportionment of the through service between them and the North British com-

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pany. We might, therefore, have simply refused the application. But, although no such alternative scheme has been presented to us, we have considered what should be done in the matter of apportionment, as to decide that now will prevent the expense already incurred under this application being thrown away, and avoid the expense of another application. For my own part, I incline to the opinion that in any division or apportionment of the train service the North British company, as owners of the line, have the higher and prior claim. But the prevailing view, to which I accede, is that the train service in question should be equally divided, and that is what we determine. If the parties cannot agree upon how that is to be done, they can present their respective views to the Court, who will adjust that.

The terms upon which the applicants are to be allowed to exercise their running powers have now to be fixed. It is admitted that the gross receipts are to be paid to the owners of the line (the North British company), under deduction of the working expenses. The applicants offer to pay to the defendants $66\frac{2}{3}$ per cent. of the gross receipts between Edinburgh and Berwick, retaining $33\frac{1}{3}$ per cent. for working expenses. These figures are supplied by a reference to existing working agreements in England. But, as I said before, in reference to another matter, the agreements of other railways do not, of course, bind any one other than the parties to them, although they may fairly enough be considered as what parties who were protecting their own interests thought fair and reasonable. We find, however, a safer criterion in what has been done by various Acts of Parliament, some of them very recent, and, adopting that criterion, we are of opinion that the applicants, in respect of the trains running under their statutory powers, should pay to the respondents 75 per cent. of the gross receipts, and retain 25 per cent. for working expenses. This allowance of 75 per cent. is to be held as including all claim for station rent. If the North British company receive the whole receipts, less what it costs to earn them, it is obvious that they are thus being paid for the station accommodation. Without that accommodation they could not earn the 75 per cent.

SIR FREDERICK PEEL.—The question here is, which of two companies shall run the trains for through traffic by the East Coast route over that portion of the route which extends from Berwick to Edinburgh. The North British own the line, and, if free to use their powers relative to working, can, of course, run trains for through or local traffic, and any through traffic arriving at their terminal station at Berwick and going south would be delivered by them to the North-Eastern company. By an agreement between the companies, dated 12th May, 1862, it was provided (Article 18) that the two companies should maintain and work in full efficiency in every respect the East Coast route *via* Berwick for traffic between London, &c., and Edinburgh, &c., and that through rates and fares, exchange of rolling stock, and other facilities, should be adopted and carried out on such route for the cultivation and development of such traffic. The North-Eastern company, therefore, would be bound to afford these facilities to through traffic received by them at Berwick from the North British company, and to forward with all due dispatch rolling stock tendered to them for continuation. The same article further provides that the North British shall give running powers and station accommodation to the North-Eastern company, and it was at the same time agreed (Article 41) that clauses for giving full effect to the portion of Article 18 giving running powers and station accommodation to the North-Eastern should be inserted in a Bill then before Parliament. This was in effect done by an agreement which the same parties entered into two days later, and which was scheduled to and made binding upon them by the North-Eastern and Carlisle Amalgamation Act, 1862. Article 8 of this agreement provides that the North British company shall at all times permit the North-Eastern company, with their engines, carriages, wagons, and trucks, to run over and use the North British railway, sidings, stations, &c., between Berwick and Edinburgh and Leith, all inclusive, subject to the payment for such user of such tolls or dues as, in default of agreement, shall be fixed by arbitration. The North-Eastern desire to use these powers, and to take their carriages and engines to convey coaching traffic along the North British line, and they apply to

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us to settle the terms, and, as to trains and their times, to transfer to them all the existing East Coast trains to and from Edinburgh. The North British say in reply that these trains are being run on their own line as their trains, and that they are able and willing to work their part of the East Coast route efficiently in every respect, and they maintain that so long as they are prepared to do this they may refuse to let the North-Eastern come upon their line as a running company. Now, no doubt they undertake by the agreement of 12th May to maintain and work the East Coast route, but they also undertake by the same agreement, and the later one, confirmed by Act of Parliament, to permit at all times the North-Eastern company to run over and use their railway, and I see nothing in either agreement to bear out the view that the North British can at their own option determine whether they will or will not maintain and work the through route, and whether they will or will not permit the North-Eastern to run. The words of the agreements are not permissive as to either matter, and as to the running powers, these are granted without limit, and the North British have no choice but to permit the North-Eastern to use their railway if that company seek to have those powers, and their own ability to give an efficient service for through traffic does not affect their obligation. It is enough that the North-Eastern think that the interests of the East Coast route, as regards its being efficiently maintained and worked, require the exercise of the running powers. The haulage of trains could, no doubt, be as well done by the North British as by the North-Eastern, but an exchange of engines at Berwick must always cause some delay, especially to trains which, if the service was continuous in one hand, might pass the junction without stopping, and run through without a break between Newcastle and Edinburgh.

The North-Eastern regard also their presence at Edinburgh as conducive to the development of East Coast traffic. The route *via* Berwick is not the only route from Edinburgh to London in which the North British company are interested. They have also the Waverley route *via* Carlisle and the Midland railway, and as they own nearly one-fourth of the distance by

that route (97 miles out of 405), and one-seventh only of the distance *via* Berwick ($57\frac{1}{2}$ miles out of 392 miles), their mileage proportion of a through fare is higher by their Carlisle route than by their Berwick route. Consequently, while the East Coast companies have no interest in traffic at Edinburgh going south by any route but that *via* Berwick, the same cannot be said of the North British company, and it is natural, therefore, for the East Coast companies to think that they will be more secure of traffic if the trains in and out of the terminal station of the East Coast route are worked as their trains, and they have their own agents at Edinburgh to attract and attend to traffic.

It appears, then, that both the North British and the North-Eastern possess statutory powers to use the line from Berwick to Edinburgh for through traffic, and as the powers each have are sought to be exercised, the only way of reconciling them in practice and making them work harmoniously is to divide the service between the two companies, and to give to each a separate portion of it. Considering, then, that the North-Eastern company have liberty at all times to run over and use the line between Berwick and Edinburgh, and, on the other hand, that the North British company own and work that line, and retain their right of carrying traffic of every kind over it, it seems to me that the two companies are equally circumstanced in respect of right to be accommodated, and that a case is made out for dividing the train service equally between them. I think, therefore, that the extent to which the application should be granted, as regards the trains and times to which it refers, should be in accordance with this view. This may not be making the best possible train arrangements for a railway communication between London and Edinburgh, but the scheduled agreement does not appear to make that the main point to be considered in determining a difference arising under it. Whether with the facilities at their command the North British will be as well able to satisfy the public as the other company will be for them to consider. They are entitled to connecting trains conveniently timed, and, as far as the North-Eastern company are concerned, to exchange of rolling stock, but the wants of traffic are, of course, better met when it can travel through

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without change of trains, and, as conveniently or nearly so as if the whole route was in the hands of one company. It is very desirable that communication between London and Edinburgh should be as rapid when East Coast company's trains are worked in connection with North British trains as when they are not, so that the public may have the same number of opportunities presented to them as hitherto of travelling through in fully efficient trains, and if the powers the North British have at present for getting their traffic forwarded should not be sufficient to effect that object, they can no doubt be increased by arrangement with the East Coast companies, and the North British may find it to their advantage to be prepared to transfer to the East Coast companies some of the trains that, according to our division, may belong to their own share of the running, if in return those companies agree to treat impartially as to facilities and forwarding over the route between Berwick and London traffic going by the North British trains, and exchanged at Berwick, and traffic going by the running-power trains.

I come next to the question of terms, to the payment to be made to the North-Eastern for their working expenses. They propose that they should be paid their actual cost of working, which they reckon at 1s. 5d. a train mile, and that they should be allowed to retain, in respect of that cost, 33½ per cent. of the gross receipts attributable to the North British portion of the through route. This appears to be the proportion usually paid in England to a running company for locomotive cost and provision of carriages, leaving 66½ to be received by the owning company for providing the railway and stations and the staff in connection with them. The North British, however, submit in their answer that they ought to receive not less than 80 per cent of the receipts, and in addition a large annual sum for each North-Eastern train each way, by way of rent for station accommodation and station services at Edinburgh. Terms such as these would require the North-Eastern to run their trains at a very considerable loss, and I see no good reason why such a pecuniary sacrifice should be imposed upon them. Nor do I think that the North British should be greater gainers in profits or net earnings than they would be if trains worked by the

North-Eastern were worked instead by themselves. Cost of terminal accommodation must be paid, like locomotive cost or any other item of expense, out of the earnings of the trains for which the accommodation is provided; and if in the case of trains run by the North-Eastern company to and from Edinburgh, the whole earnings, less only what engine power and other running charges cost that company, are paid to the North British, the earnings so received include the provision which has always to be made out of that fund to pay terminal expenses, and the North British have no claim to any further payment for them. The amount, therefore, of any rent or charge fixed under Article 12 of the scheduled agreement in respect of the North British station at Edinburgh, and paid directly by the North-Eastern, would swell the proportion of traffic receipts which would have to be allowed to that company. As to what this proportion ought to be, apart from any such payment, the North British estimate the cost of a train on the Berwick and Edinburgh section of railway at a fraction over 1s. a train mile, as against the 1s. 5d. of the North-Eastern company; but they base this estimate on the average cost of their passenger trains over their whole system, and it seems to me probable that the average cost would be exceeded on this particular part of it, having regard to its gradients, and to the speed of trains of an express through service. But even at 1s. per train mile the total cost amounts to quite twenty-five per cent. of the present gross receipts, and I do not think any less proportion should be paid to the North-Eastern. As to any higher proportion, twenty-five per cent. appears to be the general rate in Scotland; and though no rate has been prescribed in this case, as a rule Scottish railway Acts which give running powers allow twenty-five per cent. for working expenses. My view is, that the North-Eastern should have that proportion for their expenses, and that the balance for the North British should be deemed to include any rent or charge payable under Article 12 of the scheduled agreement.

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LORD COBHAM: If this could be considered as an ordinary application to the Court by a railway company having running

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powers over the line of another company for our sanction of a scheme of trains to be run under those powers, I doubt whether we should be in any sense entitled to refuse it. It is not contended that the running of these trains will in any way hamper the North British in working their own service, and although it is true that the trains proposed constitute the whole of the present through service, yet the taking of them over by the North-Eastern under running powers would not be an unusual arrangement, or one oppressive to the owning company. It is in the interests of the North British that the East Coast traffic should be worked in the most efficient manner possible, for the better the service the more they will get out of it. No doubt, under certain circumstances, the North British may cease to have as much interest in this traffic as the other two companies concerned in it. The Midland and Waverley route might be brought into competition with the East Coast route, and it might suit the North British better to carry passengers the long distance between Edinburgh and Carlisle rather than the short distance between Edinburgh and Berwick. But we are assured by the North British company that no such scheme is contemplated or even feasible, and that their interests are bound up with the East Coast route. If this be so, and if the North-Eastern has shown, as I think they have, that their position and powers give them on the whole the best means of working the through passenger traffic, then it would be in the interest not only of the public and the North-Eastern, but of the North British company itself—subject, of course, to the question of terms—that the North-Eastern should work it. It is, I think, important to remember in this connection that the exercise of running powers in this case will be more than ordinarily innocuous to the owning company. The effect, if not the object, of the granting of running powers is, as a rule, to divert traffic from the owning company, but nothing of the sort will happen here. The traffic, if worked by the North-Eastern, will be carried on the North British system just as far as if worked by the company owning it. If fair terms are fixed, I cannot therefore see that the North British would run any risk of material injury from the granting of this application. It may be, in a sense, a

grievance that a company like the North British should not have the exclusive control of its own line, but that objection was dealt with when the running powers were granted, and the same may be said of a good many arguments which have been urged in the case.

Having exclusive regard therefore to the merits of this application, and independently of the legal effect of antecedent circumstances, my inclination would be to grant it in full. But the learned judge strongly holds that, under the circumstances of the case, we are precluded from giving anything in the nature of "exclusive control" to either of the parties, and that we must apportion the through trains between them. I do not feel sure that the term "exclusive control" is quite applicable to the working of nineteen trains, which happen at the present time to constitute the through service over the line to and from the south, leaving the remainder of the passenger traffic and the whole of the goods and mineral traffic in the hands of the owning company. But I am not desirous of maintaining points involving legal considerations or questions of construction against the authority of the learned judge, and as Sir Frederick Peel also considers that an apportionment must be made, it only remains to decide what proportion of the service should be allotted to each company, and the terms upon which the North-Eastern should work their share. I have nothing to add to what has been said by my colleagues upon these points, and I concur in their conclusions thereon.

The North-Eastern company appealed to the First Division of the Court of Session against so much of the order of the Commissioners as held they were entitled to run only one-half of the through passenger trains, and to the apportionment of such trains as set out in the schedule to the order.

The North British company objected to the competency of the appeal on the ground that, as the Commissioners had been acting as arbitrators and not as a Court, their award must be held final.

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The question of the competency of the appeal was first argued, when the following judgments were delivered :—

LORD PRESIDENT (Right Hon. J. P. Robertson) : By the Act of 1888 there are transferred to and vested in a new body of Commissioners all the jurisdiction and powers which had formerly been vested in the old Railway Commission. One of its duties and powers is that described in section 8 of the Act of 1873. By that Act it is competent to any company, party to a difference, which under the provisions of the general or special Act was required to be referred to arbitrators, to bring that dispute to the Commissioners for their decision in lieu of its being referred to arbitrators. It is to be observed, it is true, that the consent of the Commissioners is one of the conditions of that reference, but the effect of it is unambiguous. Arbitration is set aside; the jurisdiction of the Commissioners is invoked. Now, it happens that that section 8 is slightly amplified by the 15th section of the Act of 1888, so as to bring in scheduled agreements as well as actual provisions of statute; and it happens that it is under this amplification that the present question has been raised. But none the less is the jurisdiction exercised in the matter before us exercised under section 8. Well, now, it is said that there is no appeal from the Commissioners acting under section 8. Just let us see, first, how the matter stood under the Act of 1873. Under the Act of 1873 the Commissioners were not final, because if they chose they could state a question of law for the determination of a superior Court, and that in the form of a special case. The Act of 1888 does away with the appeal clause of the Act of 1873. While the appeal clause of the 1873 Act discriminated between proceedings under certain sections, of which No. 8 is not one, and another set of sections of which No. 8 is one, and in the former case required the Commissioners to state a case, while in the latter set of sections it only authorised them if they chose to state a case, the Act of 1888 obliterates all such distinctions; and although its provisions are carefully limited to questions of law, yet not the less is the scope of the provision absolute and universal. "Save as otherwise provided by this Act, an appeal shall lie from the

Commissioners to a superior Court of Appeal." It seems to me, therefore, as clearly established, first, that the matters here in hand are proceedings before the Commissioners not as arbitrators, but as a Commission coming in lieu of arbitrators; and, second, that this appeal, necessarily limited as it is to matter of law, is properly brought under section 17 of the Act of 1888. Therefore I think the objections to the competency must be repelled.

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LORD ADAM: I am of the same opinion, and on the same grounds.

LORD M'LAREN: I also concur. The jurisdiction in the matter which is sought to be brought before us by appeal is defined by the 8th section of the Act of 1873, and then that definition must regulate the construction of the Act of 1888, under which the jurisdiction originally given to statutory Commissioners is transferred to the existing Railway Commission. Now if it be necessary, and I rather think it is necessary, for the decision of this point that we should determine whether the jurisdiction of the Railway Commissioners in matters arising under section 8 of the 1873 Act, as extended by section 15 of the Act of 1888, is proper jurisdiction or is arbitration, I am clearly of opinion with your Lordship that it is proper jurisdiction, because it has all the notes of independent jurisdiction. It is a permanent Court consisting of members nominated by public departments, and its intervention in any particular case does not depend on the consent of the parties, but may be invoked by either of them. The Commissioners may reject the application, and I think it is not difficult to see the reason of that restriction, because they are to judge whether this is a case suitable for their determination, or whether it may not be more properly left to be settled in the manner originally contemplated by the parties, viz., by arbitrators nominated by themselves. Besides these considerations, there is the express provision of section 8, which is very differently expressed from the 6th section of the Act of 1874. The provision of the Act of 1874 is that certain matters may be referred to the decision

1897. of the Railway Commissioners by the Board of Trade, who are to appoint them arbitrators or umpires; the provision of the Act of 1873, s. 8, is to the effect that the matter is to be referred to the decision of the Commissioners in lieu of being referred to arbitration. That being so, and indeed I should add, whether this is arbitration or jurisdiction, there lies, in my view, an appeal under section 17 of this Act of 1888, because it is not said that an appeal shall lie from a legal decision of the Commissioners, or that an appeal shall lie under certain conditions, but that, "save as otherwise provided by this Act, an appeal shall lie from the Commissioners"—that is, from every act of the Commissioners done under statutory authority, save as otherwise provided. We are not called upon to decide anything under the Act of 1874, and one can see that it might be maintained that even under the powers given by section 6 of that Act an appeal would lie, in respect that the terms of the appeal clause are so comprehensive as to embrace matters referred to the Commissioners as arbitrators as well as matters referred to them judicially. But that question does not now arise. I am satisfied that to the extent to which the statute of 1888 permits—that is, for the purposes of review on a proper question of law—this appeal is competently taken.

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LORD KINNEAR: I concur.

The Court having repelled the objection to the competency of the appeal, heard the arguments on the questions raised by the appeal.

Lord Advocate (Graham Murray, Q.C.), Guthrie, Q.C., and A. O. Mackenzie for the North-Eastern railway company.

Lord Trayner has treated the application of the North-Eastern company as one of legal right. The Commissioners should merely have determined the timing of the trains and the conditions on which such trains were to be run, apart from the owning company's rights. *Bala and Dolgelly Ry. Co. v. Cambrian Ry. Co.*⁽¹⁾. Unless the owning company proved

⁽¹⁾ *Ante*, Vol. II. 47.

that the running of a running-power train at a particular time would interfere with the traffic of the owning company, the running company were entitled as a matter of right to run such train, and the Commissioners could not refuse to order the owning company to permit the running of such train.

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Dean of Faculty (Asher, Q.C.), Solicitor-General for Scotland (Dickson, Q.C.), and Grierson, for the North British railway company.

The order of the Commissioners involved no question of law. An appeal lay from the ultimate order of the Commissioners and not from their judgment, which it was irrelevant to consider. If it were to be held that a question of law had been decided, then the view of the Commissioners was right. *Highland Ry. Co. v. Gt. North of Scotland Ry. Co.* ⁽¹⁾. A running-power company had not the right to put on a full service of trains to the total exclusion of the owning company.

LORD PRESIDENT: The Railway Commissioners, by the order dated 28th April, 1897, against which these appeals are taken, have determined that the North-Eastern railway company shall be entitled to run between Edinburgh and Berwick one-half of the East Coast through passenger trains between Edinburgh and London. The order fixes the amount to be paid by the North-Eastern to the North British in respect of these trains. The application of the North-Eastern company, which set the Commissioners in motion, was for right to run about double the number of trains which the Commissioners have allowed. It is admitted that the trains which the North-Eastern company claimed form what is called a complete service; that is to say, that they are all the trains required for the due service of the East Coast route between London and Edinburgh.

On the face of the order no question of law purports to be decided; on the face of the order what is decided is the number of trains and the amount of money. In this respect the order seems quite properly to represent the fulfilment of the duties of

(1) 23 S. L. R. 752.

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the Commissioners as coming in place of arbiters under the sections of the agreement scheduled to the Special Act, to which we have presently to refer.

Such being the form and substance of the order, it has been argued that no appeal lies, inasmuch as the order discloses no decision of a question of law. To this argument we are unable to accede. It is true that an appeal only lies to this Court on questions of law, but it does not follow that an appeal only lies where the order expresses a decision on a question of law. The order is the expression of the ultimate, practical, and operative conclusion arrived at; and it by no means necessarily sets forth the ground of judgment upon which it is based. But, if it shall authentically appear that the *medium concludendi* is a decision on legal right, then the circumstance that this decision is not expressed in the words of the order cannot affect the right to appeal.

Let it be observed that while, under the Act of 1873, appeal only lay upon a special case stated by the Commissioners at the request of the party aggrieved, that system has been done away with, and in place of it has come the more general and elastic provision of section 17 of the Act of 1888. It is true that now, just as much as under the former practice, this Court can only entertain questions of law; but the point is that under the present system, the appeal is not confined to questions formulated by the Commissioners. In order therefore to effectuate the existing right of appeal, this Court may examine the judgments of the Commissioners for authentic information as to whether the decision on the practical matter in hand truly depended on a conclusion formed as to legal right. This Court will not be prone to search for or to discover legal questions, and the incidental expression of opinion on legal rights would not let in an appeal. But if it shall be seen on the face of the judgments of the Commissioners that, because of a conclusion on a question of law, the Commissioners have decided in a certain way or have held themselves precluded from doing what otherwise they were free to do, then the order thus produced is open to appeal, and must depend on the soundness of the legal decision.

In this view it is necessary to consider, first, what was the question before the Commissioners. The Commissioners, as coming in place of arbiters, were sitting to determine under sections 8 and 17 of the scheduled agreement of 14th May, 1862, what trains they should order the North British company to allow the North-Eastern company to run between Berwick and Edinburgh. Now, in exercising this jurisdiction, the Commissioners had a very free hand indeed, derived from the contract between the two companies as embodied in those two heads of the agreement. A great deal has been said about the relative rights of owning companies and companies having running powers. We have not to consider, nor had the Commissioners to consider, any such abstract question. Between the two companies before us it is matter of agreement that, for the purpose of maintaining and working the East Coast route in full efficiency, in every respect, the North British shall permit the North-Eastern to use their railway between Berwick and Edinburgh, to such an extent and for such payment as the Commissioners shall determine. If, then, it be asked, as matter of law, what number of trains is the North British company bound to allow the North-Eastern company to run, the answer is, exactly such number, be it large or be it small, as the Commissioners shall determine. If it be asked what number of trains the North-Eastern has a legal right to, the answer is the same. By the contract, no reservation of legal right is made from the complete surrender of the question to the discretion of the Commissioners. It is, of course, necessary that the North-Eastern trains are to be run for maintaining and working in full efficiency the East Coast route; but, this being the common interest to be advanced, the Commissioners are to be the absolute judges how many North-Eastern trains shall be run and on what terms. The power of the Commissioners to fix not only the number of trains, but the money to be paid for them by the North-Eastern, afforded the Commissioners the fullest means of equitably adjusting the balance between the parties.

In this view it was entirely open to the North British to advance to the Commissioners all sorts of considerations as entitling them to have fewer North-Eastern trains imposed on

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1897. <hr/> NORTH- EASTERN Ry. Co. v. NORTH BRITISH Ry. Co. <hr/> Ld. President.	them than the North-Eastern asked, and among these considerations, or at the head of them, if they pleased, the fact that they were owners. Of the degree of cogency or relevancy belonging to this argument we have no occasion to pronounce. One Commissioner might quite lawfully attach much weight to it, another might equally lawfully deem it to have little or no bearing on the question, compared with other considerations in the case. All that it is needful to say here is that the fact of the North British being the owners formed no legal obstacle to the Commissioners granting the North-Eastern all that they asked in their application.
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Now, when we turn to the judgments of the Commissioners, we find that two out of the three Commissioners have proceeded upon the legal proposition that the fact that the North British were owners rendered it legally impossible to grant the application of the North-Eastern.

The theory of Lord Trayner's opinion is that the relations between the North British and the North-Eastern are those of the owner of a private road, and a person having a servitude of passage over that road. We do not think that this view is sound in principle, and it is misleading. A private road is private property which the owner might, but for the servitude, close and apply to any other uses. That is not the legal position of a railway; nor are these the rights of an owning company. The "notion," says Mr. Justice Wills in *Hall v. The London, Brighton, and South Coast Ry. Co.* ⁽¹⁾, "of the railway being a highway for the common use of the public in the same sense that an ordinary highway is so, was the starting point of English railway legislation. It is deeply engrained in it. In the early days of railways it was acted upon at least occasionally, and, although it enters but slightly into modern railway practice, no proper understanding of a good deal of our railway legislation, and pre-eminently of clauses relating to tolls or rates, can be arrived at unless it is firmly grasped and steadily kept in view."

The difference which has now been pointed out is so essential

⁽¹⁾ *Ante*, Vol. V. at p. 33; 15 Q. B. D. at p. 536.

that it is impossible to ascribe to the company owning a railway the rights of the owner of a private road. Again, when the agreement is examined, upon which the present application of the North-Eastern is rested, it does not place or leave the contractual rights of parties upon any such footing as that of servitude. The two companies are pledged as allies to the furtherance of a common enterprise, forming part of the traffic of each of the allied companies, viz., the East Coast route traffic, for which a certain amount of use, although not an exclusive use, of the North British line is required. By contract, the North British company places their line at the disposal of the North-Eastern for the furtherance of this East Coast traffic, to whatever extent the Commissioners, as coming in place of arbitrators, shall determine. It does not seem to us that the right thus conferred on the North-Eastern is a servitude in the sense in which that term is known in Scotch law, any more than the position of the North British antecedent to the contract could be described as that of an owner of a private road. Still more clearly, under the statutory contract which the Commissioners had to deal with, no legal right of the North British was reserved which could be invaded by the Commissioners granting the full numbers of trains asked by the North-Eastern.

Now, in the very lucid opinion of Lord Trayner, there is no ambiguity in the law which he lays down. We have very carefully considered the judgment as a whole, as well as the passages in which the matter now before us is specifically dealt with, and nothing in the rest of the judgment detracts from the precision with which the legal result is stated. "To do so," that is to say, to grant the North-Eastern power to run the whole of the trains in dispute, "would, in my opinion, be something a great deal more than regulating the use of co-existing rights; it would be an unwarrantable invasion of the rights of the North British company. I am not to be understood to say that the Court could not, under any circumstances, grant such an application as that now before us. I can conceive circumstances under which it might, as, for example, if the North British company were unable to work the through traffic

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efficiently—or refuse to do it—or were clearly acting in such a way as to injure the East Coast route, which it had bound itself to maintain and work. Probably in such circumstances the Court might interfere. But in the circumstances of the case before us, I am clearly of opinion that the Court cannot grant this application as made, because by so doing they would be depriving the North British company of the proper and legitimate use of their own property; in short, doing it a wrong.”

Upon the law of the case as thus laid down, Lord Trayner himself proceeds; for, remarking that, as the North-Eastern presented no alternative scheme, “we might therefore have simply refused the application,” he goes on to consider what would be a proper apportionment. Lord Cobham acted upon the law thus laid down, for he held himself precluded by that law from the course which he would have followed, if the merits had been open to him, of granting the application. His words are these:

“Having exclusive regard, therefore, to the merits of this application, and independently of the legal effect of antecedent circumstances, my inclination would be to grant it in full. But the learned Judge strongly holds that, under the circumstances of the case, we are precluded from giving anything in the nature of ‘exclusive control’ to either of the parties, and that we must apportion the through trains between them. I do not feel sure that the term ‘exclusive control’ is quite applicable to the working of nineteen trains, which happen at the present time to constitute the through service over the line to and from the south, leaving the remainder of the passenger traffic and the whole of the goods and mineral traffic in the hands of the owning company. But I am not desirous of maintaining points involving legal considerations or questions of construction against the authority of the learned Judge, and as Sir F. Peel also considers that an apportionment must be made, it only remains to decide what proportion of the service should be allotted to each company, and the terms upon which the North-Eastern should work their share.”

The full effect of this is understood when it is remembered that the Act of 1888 provides that the opinion of the Judge

shall prevail upon any question which, in the opinion of the Commissioners, is a question of law. That this was, in the opinion of Lord Trayner and of Lord Cobham, a question of law is shown by their judgments; and, as Lord Cobham's judgment was read in presence of Lord Trayner, it is plain that Lord Cobham was under no misconception in deeming it had been laid down that the prayer of the application could not be granted without an invasion of legal right.

In these circumstances, it appears that by two out of the three Commissioners this application has not been considered on the merits, the two Commissioners having held themselves precluded from doing so by what were held to be the legal rights of the owning company. By those two Commissioners it has been assumed that of the through trains in question the North British must, as of legal right, have some. Our opinion is that there is no such legal right; that no legal right stands in the way of, or limits the free exercise of, the judgment of the Commissioners.

It is consistent with the view of the question which has now been stated, or rather it results from it, that the fact of the North British being owners of the line is one of the very numerous matters which legitimately enter the consideration of the Commissioners. As already pointed out, we have no occasion, no duty, and no right to assign to this its proper place or precedence among other matters; that is entirely for the Commissioners.

Again, our judgment on this appeal does not indicate, and is not intended to suggest any opinion whatever as to whether all or how much of what the North-Eastern ask ought to be granted. We have no occasion, no duty, and no right to express or to form any such opinions. For anything we know, a consideration of the merits of the case might lead the Commissioners to pronounce exactly the same order as we are now to recall, and the repetition of the order would not be in the slightest degree inconsistent with our present decision. Our duty is merely to decide the question of law which is raised by the appeal.

The appeal of the North-Eastern is quite naturally directed against that part of the order which specifies the number of trains, and the trains which they are to be allowed to run, and

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1897. <hr/> NORTH- EASTERN RY. CO. v. NORTH BRITISH RY. CO. <hr/> Id. President.	not against those parts of the order which fix the rates. It is plain, however, that these matters are directly related, and that the Commissioners, if they are to reconsider the one must be free to reconsider the other. We have ample power to bring this about; and our judgment is as follows: We recall the whole order, find that the fact that the North British railway company are owners of the line between Berwick and Edinburgh does not of itself entitle them, as of legal right, to run some of the East Coast through trains in dispute, and does not constitute a legal objection to the application of the North-Eastern railway company, but may be considered along with the other circumstances of the case in disposing of that application; and remit the application, with the proof and whole proceedings, to the Commissioners to proceed as shall be just.
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On a re-hearing the Commissioners affirmed their former decision as to the granting of running powers to the North-Eastern railway company, and as to the terms on which such powers should be exercised.

[Solicitors for the North-Eastern Ry. Co.: *Cowan & Dalmahoy*, Edinburgh, for *A. K. Butterworth*, York.]

Solicitor for the North-British Ry. Co.: *James Watson*, Edinburgh.]

MANCHESTER AND NORTHERN COUNTIES FEDERATION OF COAL
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v. .

MIDLAND RAILWAY COMPANY⁽¹⁾.

*Indirect increase of Rates and Charges—Charge for Accommodation after
Conveyance—Siding Rent—Railway and Canal Traffic Act, 1894
(57 & 58 Vict. c. 54), s. 1.*

A railway company, being bound to give a reasonable time to the traders, after conveyance, to take delivery, prior to 1894 allowed the traders four clear days for that purpose, but calculated the four clear days not on one truck but upon the average time that all the trucks of a particular trader occupied the railway company's sidings. After 1894, they allowed four days exclusive of the day of arrival, but calculated the time allowed on each truck and not on the average. This was complained of as an indirect increase of rate, which the railway company were called upon to justify, under section 1 of the Railway and Canal Traffic Act, 1894. *Held*, that there was no indirect increase of the tonnage rate, because, under the former system, no particular ton of coal would have had greater accommodation as regards time than under the new system.

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THIS was an application by an association of freighters under section 1 of the Railway and Canal Traffic Act, 1894, complaining of the practice of the railway company to charge for siding rent when wagons not belonging to the railway company containing coal and coke remained undischarged on their sidings beyond the period reasonably necessary for the consignees to take delivery of the coal and coke. It appeared that before the year 1895 the railway company had adopted as their measure of user the total user of a certain siding, or set of sidings, by a certain freighter during each separate month. Consequently, a particular trader was, under that system, allowed a number of days four times as great as the number of wagons consigned to

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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him in any month. For user in excess of the time so calculated, the railway company charged a siding rent of 1s. per wagon per day. On 1st March, 1895, the railway company changed their practice, and adopted as the unit of measure the time occupied in the discharge of each separate wagon, allowing four clear days for that operation, and after that period charging 6d. per wagon per day as siding rent. The freighters alleged that this was an indirect increase of the railway company's charge, for under the new system, for the same rate, the freighters received a smaller amount of accommodation, their trucks being allowed to remain a shorter time on the railway company's sidings.

Balfour Browne, Q.C., and *Waghorn*, appeared for the applicants.

C. A. Cripps, Q.C., and *Edward Boyle*, for the railway company.

The facts and arguments on behalf of the applicants are fully set out in the judgments.

COLLINS, J.: This case, undoubtedly, raises a very nice point, and really rather a substantial point; but on reflection I have come to a perfectly clear conclusion on it in my own mind. Mr. Balfour Browne put the case with his usual point and clearness, and rested it on one point only. He said: "This is an application under the new jurisdiction created by the Act of 1894; I say that a new arrangement has been made by the railway company, which has had the effect of reducing the amount of accommodation given by the railway company in return for the tonnage rate; I say that whereas before under the then arrangements the merchant had a certain period during which, in return for his tonnage rate, he was entitled to the free use of the sidings, by an alteration of their arrangements they have cut down that period, and therefore while the trader pays the same rate he gets a reduced accommodation in return for it; that is an indirect raising of the rate, and therefore the burden is thrown on the railway company of justifying." That was his point. He said: "It is not in the least material to that

point whether or not the charge which the railway company make for the accommodation which they give, after the period covered by the tonnage rate has expired, is more or less than it was before; that might raise the question that that of itself might be an addition to the charge or rate which would come for consideration under the first section of the Act of 1894; but that is not the case that I am making here to-day; when I come to examine the question of the charge made for the after accommodation now, as compared with the charge made for the after accommodation before, I find that I am not able, or, at all events, I do not think it advisable, to raise before this Court the question whether or not that is an increase." Therefore that is not the point we have to deal with on Mr. Balfour Browne's application. We have to deal with the only point he raised, namely, whether, in point of fact, the accommodation given in return for the tonnage rate has been reduced by the new arrangement so as to lead to a contention that there has been an indirect raising of the rate; that is to say, an indirect raising of the rate by reducing the accommodation given in return for it. That depends on an examination of what was done in the past, as compared with what is done now in respect of the accommodation given by the railway company in return for the tonnage rate. When I come to examine that carefully, with the assistance of counsel, I am clearly of opinion that there is no difference whatever. The amount of accommodation given under the old arrangement is clear, it seems to me, upon the terms of the former agreements which were made in the common form between the railway company, and, at all events, I think I am entitled to say, the great majority of the traders dealing with them. Up to the date of the passing of the Provisional Order, if any sum was to be paid by a trader to the railway company in respect of such accommodation, after the period covered by the tonnage rate, it had to be matter of agreement. There was no obligation on the trader to pay—or, at least, it is not at all clear that there was, and I should not like to say finally there was—but there was a sufficient doubt about it to make it very difficult for the company to assert against a trader that he came under any obligation to pay them for the use of

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their sidings after a particular time unless they had an agreement with him to do it. In that view there was a common form of agreement made which was entered into with the great majority of customers—not with all—and I only refer to that agreement as defining what the actual practice was as regards that accommodation recognised between the parties as reasonable, and, in fact, given in return for the tonnage rate.

Now let us see what it was. It is defined in terms in these agreements, and this is what was given: "The time allowed for unloading each wagon is four clear days from the date of arrival, after which the company charge siding rent at the rate of 1s. per wagon per day." Four clear days from the date of arrival I should construe to mean this: that there were four clear days within which the operation had to be performed; that they had four days and no more within which the operation of unloading had to be completed—but they were four clear days. Therefore the day of arrival was excluded from the computation of those four clear days; but, as I have already said, the operation had to be completed within the four clear days. They had not four clear days in which to do nothing, and then a fifth day within which they might unload. They had four clear days, and within those four clear days the operation had to be completed. That was the old rule.

Now what is the new? The new arrangement, which is in slightly different phraseology, seems to me to be precisely the same: "Four days will be allowed free of charge to the consignee to unload each wagon, exclusive of the day of arrival." That is, in other words, four days clear of the day of arrival, exclusive of the day of arrival; but the operation must be completed within those days. Therefore, the accommodation given under the tonnage rate was precisely the same in both cases.

But a change has been made, and what is it? A change has been made in computing the amount to be paid by the trader for after accommodation. Whereas, under the former arrangement, when they came to compute how much the trader should pay for user of the siding after the expiration of the four days, the company did say: We, for reasons which we deem, or hope at all events, will be sufficient, are prepared to give you a credit

in reduction of your obligation for user after the four days, measured by the number of days, short of the four days, for which you have used the siding in respect of your wagons, and we will allow you to so deduct from the sum payable by you to us at 1s. per day per wagon in respect of your after use. That was simply a method of calculating the sum to be paid between the parties for the user after the expiration of the four days. For that method of calculating a new one has been substituted. They have changed the 1s. into 6d. ; whereas they exacted 1s. before, they exact 6d. now, and they give no set-off or credit in respect of the days of siding user saved by the more rapidly emptying of the wagons on the part of the trader. That is all. It is simply a difference in the sum charged to the trader for the after use. As I have already said, that might or might not, dependent on the facts, be an increase in that charge. If it were an increase in that charge, then by the decision of this Court I think there would be jurisdiction in the Commissioners to deal with it under the first section of the Act of 1894, and all the usual considerations would then come into discussion ; but that point is not raised before us. Mr. Balfour Browne, no doubt, has taken that course for abundant satisfactory reasons, and I think I can see some, if not all, for myself. No doubt he has the best reasons for not raising that point. It is enough for me to say it is not raised ; and, therefore, on the only point that is raised, I come without hesitation to the conclusion that this application is not made out, and therefore must be dismissed.

SIR FREDERICK PEEL : I understand Mr. Balfour Browne's complaint to be that the tonnage rate has been increased. I do not think that has been made out, because it cannot be said as to any particular ton on which the rate is charged that if the old system had still been in force that ton would have had any greater accommodation given to it as regards time for unloading than is given to it under the existing system. It is true that in some cases coal would have had a longer time to be unloaded than in other cases ; but that was owing to an accident, and to the circumstances that some other coal had taken less time to

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unload than was allowed for it; but as regards any particular ton in any particular truck, it was allowed just the same privilege as regards time for unloading as is allowed now; and therefore it seems to me there has been no increase of the tonnage rate.

LORD COBHAM: I concur.

[Solicitor for the applicants: *G. Turnbull*, Bradford.]

Solicitors for the Midland railway company: *Beale & Co.*]

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LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.¹

*Indirect increase of Rates and Charges—Charge for Accommodation after
Conveyance—Siding Rent—Liability as Carriers ceasing—Railway and
Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.*

Prior to February, 1895, the railway company's tonnage rates included the user of their sidings by the consignees (for coal trucks not belonging to the railway company) for an indefinite period. From the 1st of March, 1895, the railway company made a charge of 6d. per truck per day as "siding rent" after four clear days had been allowed for the discharge of the coal. *February 2, 3,
4, 1897.*

The applicants contended that this was an "indirect increase of a rate or charge" within the meaning of section 1 of the Railway and Canal Traffic Act, 1894, and had to be justified by the railway company. They further contended that the proposed charge was "*ultra vires*" as being a general condition applicable to the rates and charges authorized by the Railway Companies' Rates, &c. Order Confirmation Act, 1892.

Held, that the duty of a railway company as carriers ended after putting the merchandise in a position where the trader could take delivery, and leaving it there for such a reasonable time as would enable the trader, with ordinary appliances, to get his merchandise out of the truck. And that, although the convenience of the trader, since 1st March, 1895, had been curtailed, the four days was an attempt by the railway company to fix an extreme limit of time up to which they were content to bear the obligation of "carriers," and to deem it as covered by the conveyance rate; and that making a charge for something for which no charge had been made before (*viz.*, warehouse accommodation) did not constitute an increase, direct or indirect, of any rate or charge.

Held, further, that the charge was not "*ultra vires*," it being authorised by sub-section 4 of section 5 of the Railway Companies' Rates, &c. Order Confirmation Act, 1892, which gave the right to charge for "the detention of trucks or the use of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof."

Held, further, that the "*quantum*" to be paid by the trader to the railway

(¹) Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount CORHAM, sitting at the Royal Courts of Justice, London.

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company was a question expressly reserved for the consideration of an arbitrator and must be decided on the facts proved in each particular case.

THIS was an application under section 1 of the Railway and Canal Traffic Act, 1894, and was in the following terms:—

"1. The applicants are an association of freighters who have obtained from the Board of Trade a certificate that they are in the opinion of the Board of Trade a proper body to make to the Railway and Canal Commissioners a complaint in respect of the matters hereinafter appearing.

"2. Prior to the last day of February, 1895, the tonnage rates charged by the railway company for the conveyance of coal and coke were held to include the user of the railway company's sidings for such period as the consignees required to take for the discharge of the same.

"The traffic in coal and coke on the railway is conveyed almost exclusively in wagons not belonging to the railway company, and the interest of the owners of the wagons was, and is, sufficient to secure a reasonably prompt discharge of the same.

"3. On and from the 1st day of March, 1895, the railway company propose to levy a charge of 6*d.* per wagon per day under the title of Siding Rent upon all wagons containing coal or coke, and remaining undischarged upon sidings belonging to the railway company for a longer period than three clear days.

"4. Such charge will constitute a very serious indirect increase upon the rates theretofore charged by the railway company.

"Such indirect increase of rate is unreasonable and cannot be justified by any circumstances arising after the passing of The Railway Rates and Charges No. 10 (Lancashire and Yorkshire Railway) Order Confirmation Act, 1892.

"5. The applicants will contend that the said proposed charge for siding rent is not of the nature of a reasonable charge within the meaning of section 5 of the said Order Confirmation Act, 1892, but is of the nature of a general condition applicable to the rates and charges by the said Act authorized, and as such general condition it is *ultra vires* the railway company to endeavour to enforce the same until the said general

condition has been submitted for approval to the Board of Trade, and has received the sanction of Parliament.

"6. The applicants have complained to the Board of Trade under section 31 of the Railway and Canal Traffic Act, 1888, in respect of the aforesaid increase of charge, and the Board of Trade have considered the applicants' complaint.

"The applicants apply to the Railway and Canal Commission under section 10 of the Railway and Canal Traffic Act, 1888, and under section 1 of the Railway and Canal Traffic Act, 1894 :—

- "1. For an order declaring that the conditions sought to be made applicable by the railway company to the charges for siding rent as complained of herein are *ultra vires*, and the charges made thereunder are illegal.
- "2. For an order declaring that the indirect increases sought to be made by the railway company upon the rates in operation on the last day of February, 1895, by the addition thereto of a charge for siding rent are unreasonable, and are not due to be charged by the railway company."

The answer of the Midland railway company was as follows :—

"1. The Midland company deny the allegations contained in paragraph 2 of the application, except that coal and coke is conveyed almost exclusively in wagons not belonging to the railway company.

"2. Paragraph 3 of the application is not correct. The Midland company allow four clear days for the discharge of wagons, exclusive of the day upon which the wagon has arrived, except in cases in which the wagon has arrived so early that the consignee is advised of its arrival before 9 a.m., in which case the four days allowed for its discharge include that day.

"3. The Midland company do not admit that the charge referred to in the application constitutes an increase of charge over the charges which the railway company made before 1st March, 1895, or an increase of charge within the meaning of the Railway and Canal Traffic Act, 1894; but if such an increase of charge has been made as alleged, it is reasonable in the cases to which it applies.

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"4. The time allowed by the Midland company is all that is reasonably necessary to enable the consignees to take delivery of the coal and coke consigned to them, and in the great majority of cases the consignees do take delivery before the expiration of the time which is allowed to them. In some cases the consignees, although the time limited is sufficient to enable them to take delivery, do not do so, because it suits their purposes better to leave their coal and coke in the wagon on the sidings, and the charge which the railway company make for the use of their sidings for the consignees' purposes for a further period beyond that which is necessary to enable the consignees to take delivery is reasonable.

"5. The Midland company have experienced great difficulty in conducting their traffic owing to the use of their sidings by consignees of coal and coke for storage purposes, and these difficulties had increased so much that it was necessary to impose the charge complained of for the purpose of preventing the blocking of the railway company's siding accommodation at their various stations by consignees who desired to use the railway company's sidings for storage purposes instead of providing for themselves the storage which they required or regulating the arrival of their wagons to suit the requirements of their trade.

"6. The Midland company deny that the charge which they make for siding rent is a serious increase of the charges which they have hitherto made. The freighters come under no obligation to pay the said charge if they act reasonably in the conduct of their business."

Balfour Browne, Q.C. (Waghorn with him), for the applicants.

The railway company's charge of 6d. after four days is an indirect increase of charge because it has never been charged before. The imposition of a charge is an unreasonable thing, because four days is not a sufficient time to give the traders to unload. It is not a reasonable charge, because it is not framed with reference to the special circumstances of each case.

C. A. Cripps, Q.C. (C. A. Russell, Q.C., and Ernest Moon with him).

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The railway company have acted reasonably as carriers in the time allowed for unloading. On the expiration of such time they have made a proper charge for the occupation of sidings in the nature of a siding rent. Whether any charge is to be made after the siding has been occupied for a certain time, and, if so, whether a charge of 6*d.* is a reasonable sum, is a matter not within the Railway and Canal Traffic Act, 1894, but is a matter to be settled by arbitration, when it arises, under the Rates, &c. Order Confirmation Act.

COLLINS, J.: This case raises undoubtedly a very important question to the coal trade at stations served by the Lancashire and Yorkshire railway company. It has been exceedingly forcibly argued on behalf of the applicants by Mr. Balfour Browne. I have, however, come to the conclusion that the application must be dismissed. I think when the facts are analysed it will be found that the principles of law underlying the position are simple and admit of only one application.

Now, the case launched is broadly this. The traders on behalf of whom the Federation of Coal Traders apply undoubtedly receive a very large measure of convenience at the hands of the Lancashire and Yorkshire railway company. It is perfectly clear that that convenience has been curtailed. There is no doubt whatever about that, and under these circumstances they seek to bring themselves under the provisions of the recent Act of 1894. They say that the railway company have, directly or indirectly, increased a rate or charge: that they have made a complaint, and that it therefore lies on the railway company to prove that the increase of the rate or charge is reasonable. That is their main point. They also contend that, having regard to the special manner in which the alleged increase was made, it is open to the objection that it is beyond the powers of the railway company, as being general and not special, and therefore is invalid in point of law.

I will deal with each of these points. It is absolutely essential, before the applicants can move a step in this case, to show

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that there has been a direct or indirect increase of a rate or charge. That must obviously depend on what was done before the alleged increase and what is done after and under the arrangement alleged to be one of increase.

Now, the alleged increase is brought about under a circular which was issued after a notice given on the 31st January. There was a general notice given on the 31st January, 1895, and in pursuance of that notice a formal alteration was made in March, 1895. These are the terms of the notice of the 31st January: "Dear Sir,—I have to inform you that, as great and continued delays take place in discharging loaded coal and coke wagons, involving the company in serious additional expense, and impeding the working of their sidings, yards, and stations, it has been found necessary to require payment for such undue and unreasonable occupation of their premises, and the following conditions will come into operation on and from the 1st March next. Advice will be given daily to each merchant of the arrival of any wagon consigned to him, at either the company's yards or depôts, or at any of the company's storage sidings, or sidings external to a station or yard, where the wagons may be left for the convenience of the consignee. Four days will be allowed free of charge to the consignee to release each wagon. In the event of any wagon not being released within the time limited as above, the consignee will be required to pay siding or standage rent at the rate of 6*d.* per day, or part of a day, for every wagon not so released, and remaining on the company's premises." That was the general notice which they gave, and from and after the 1st March the form of advice note for coal and coke traffic was this: "The undermentioned trucks of coal or coke having arrived this day consigned to you, I have to notify that under the company's regulations four days will be allowed free of charge to release each wagon. If not unloaded within four days, siding rent will afterwards be charged at the rate of 6*d.* per truck per day, or part of a day, until unloaded." Now, that is the new practice that was inaugurated on the 1st March. How does that compare with the old practice? Under the old practice the wagons were delivered on to the sidings of the Lancashire and Yorkshire railway company, and they were

allowed to remain there practically an indefinite time. The railway company did not exact any extra charge from the consignee, no matter how long he allowed his wagon to lie there before he took the coals out of it. Under these circumstances, the traders say: "Just see what a large increase there has been in the charges made to us; whereas formerly our wagons were allowed an indefinite time to stand on the sidings, they are now curtailed to four days, which are given in return for the tonnage rate and the station terminal, and after that it is proposed to impose the 6d. per wagon per day; and that is a vast change and a great increase." Now that depends upon how much was given before for the same consideration. The consideration is common to both cases—that is to say, their statutory conveyance rate and their statutory station terminal. That was given before and that is given after. We have got to consider how much accommodation did the carrier give in return for that consideration before and how much does he give now. If he gives the same now as he gave before in return for the same consideration, there has been no change. That, as I have said, involves an analysis of the facts. Now take this case, because it is best to deal with these things by illustration. We were told that in one instance, no doubt an extreme instance, under the old system, a trader left his wagon there for 100 days. What was the carrier's obligation with regard to that wagon? It was to deliver it within a reasonable time. What we have to look at here is the process of delivery. That is all the carrier is concerned with. He keeps the goods over and above the mere time of transit for such a reasonable time as is necessary for delivery. He keeps the goods during that time with the full liability and obligation of a carrier, and when you consider what is a reasonable time for delivery you have to consider it in that light. It is not a reasonable time having regard to the use which the consignee would like to make of the truck with the coal in it after the carrier's duty is over, but a reasonable time for the purpose of carrying out that which the carrier has contracted to do—that and nothing more. All that he undertakes, and all that he receives consideration for, is the carrier's duty, which ends after he has delivered the goods—that is, has put the goods

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in a position where the trader can take delivery, given him notice of the fact, and left them there for a reasonable time, such as would enable the trader, with ordinary appliances, to get his goods out of the wagon. When he has done that the higher liability, imposed upon the carrier beyond that of all ordinary bailees, ceases, and from and after that he comes under a totally different set of obligations.

Now, looking at the case of the trader who left his wagon there for 100 days, can any reasonable man assume that during the whole of that 100 days the obligation of the carrier, who was liable as insurer except against the act of God or the king's enemies, remained? Clearly not. If so, when did it determine? It clearly determined when a reasonable time had elapsed—a time within which, on the principles I have laid down, the trader, acting reasonably, might have taken the coals out of that wagon; and that reasonableness I think must be determined, not by reference to the after-use which it would have been convenient to the trader to put that wagon to after the coals had arrived, and he had the opportunity of taking delivery, but with reference to the fact that the carrier's obligation as an insurer remained up to the expiration of that reasonable time.

Now, if I were to address my mind to that question, with respect to any wagon, I should unhesitatingly say that that period had expired certainly no later than at the end of four days from the date when the wagon arrived and was in a condition to be delivered. I think that standard is abundantly justified by the observations in the case of *Chapman v. Great Western Ry. Co.* ⁽¹⁾ which have been referred to. Mr. Balfour Browne, with his usual ingenuity, tried to distinguish that case on the ground that there were special circumstances in it which altered the common law rights of the parties; but the Lord Chief Justice points out that those circumstances, so far as they were special, were to be eliminated, that they did not alter the true principles upon which the case must be decided; and he says at page 281, having gone through those points: "We have therefore to consider the question with reference to general

⁽¹⁾ 5 Q. B. D. 278; 49 L. J. Q. B. 420.

principles alone." Then, after dealing with defaults on the part of the carrier, he proceeds: "The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable, not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night-time, or of which the arrival is uncertain, as of goods coming by sea or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot for his own convenience or by his own laches prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him," and so on. "His ignorance—at all events, where the carrier has no means of communicating with him, which was the case in the present instance—cannot avail him in prolonging the liability of the carrier as such beyond a reasonable time. When once the consignee is *in mora* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee; being confined to taking proper care of the goods as a warehouseman, he ceases to be liable in case of accident." Later on he suggests a principle which assists one in arriving at the point of time which divides the carrier's liability from that of the ordinary bailee. He says, referring to *In re Webb* ⁽¹⁾: "There the defendants, the carriers, in order to obtain their exclusive custom, had agreed with the plaintiffs to store all goods arriving for them in the defendants' warehouse, free of charge, till it suited the plaintiffs to take them away. A fire having accidentally broken out, and goods of the plaintiffs, which had been lying at the defendants' warehouse upwards of a month, having been destroyed, it was held that, the goods having been in the keeping of the defendants for the convenience of the plaintiffs, the defendants were not liable for the loss.

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⁽¹⁾ 8 Taunton, 443.

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Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiff, and the same result must ensue." Now, there is a certain point of time up to which the goods are in the possession of the carrier as much for the carrier's convenience as for that of his customers. That time is decided by the considerations which I have already dealt with—namely, how long would it take for an ordinary trader to effect the operation of taking delivery under the particular circumstances of the place where the delivery was to be had, and so on. Up to that time the goods are in the carrier's possession and under the carrier's liability, for the convenience of the carrier as well as the trader. When that time has expired they are there simply for the convenience of the trader; and if they are there, and if and when they begin to be there, for the convenience of the trader only, then the liability of the carrier is at an end and that of the bailee begins.

Now, we have had a great deal of evidence in this case, and I think possibly some of it need not have been laid before us, because it simply reiterated what was thoroughly established in the first hour of the investigation—namely, that the real point here is that the traders carrying on their trade in that part of the country find it very convenient to use the sidings of the railway company as their shops or depôts. That is the way in which they carry on their trade. For all I know, it may be the most convenient way of carrying on their trade. We have had one or two large traders before us who have depôts, but as a general rule the witnesses before us have not depôts, and they have frankly told us that *qua* the operation of emptying their wagons there would be no difficulty in doing it in a much shorter time than four days, but that the real point which makes four days or a longer time than four days desirable in certain instances—they do not say that it is desirable in a very large percentage of instances—in fact, on the contrary, it is only desirable in a small percentage of instances; but the reason that it is desirable is that the exigencies of their trade render it difficult or impossible for them to gauge exactly the amount of coal that they will be able to get rid of at once. Various reasons lead to that result, but the fact is that they say that they

are frequently in possession of coal for which they have not got customers, and inasmuch as they have not customers it is not convenient for them to take delivery within four days, and it is very convenient for them to leave it there for a longer period than four days. I have not the slightest doubt about that. I was fully satisfied as to that after the first half-hour of the investigation, but I point out that that ground of complaint and of inconvenience is not one that arises in this case. And why? Because the right to retain the use of these wagons as a warehouse or depôt was not covered by the rate then in existence. There was no rate then in existence which covered it, and as was pointed out in a case which was decided by the Commissioners when Sir Frederick Peel was presiding, it would have been a very improper thing then to have included in their tonnage rate any charge for such part of the accommodation.

Now, how does it come about that the railway company are making this charge now? I have said that in my opinion four days is ample to allow as the time within which the carrier's obligation continues. I think that in the vast majority of cases it lasts for a very much shorter time, and I think that fixing four days was a concession by the carrier to the consignee. I think it might be difficult for the carrier after that concession—I do not know that he would be precluded—but I think it would be difficult for the carrier to say that his large obligation *qua* carrier did not continue up to the end of the four days. However, I am not deciding that point, but I think that the understanding or undertaking that he should at all events for a certain purpose be deemed a carrier up to four days was a concession to the consignee, and I think that the real period during which the carrier's business of delivering the wagons, looked at from the standpoint and governed by the principles which I have explained, may be probably comprised and accomplished in a very much shorter period. I say that, because a great point has been made before us by Mr. Balfour Browne and by his witnesses that the railway company must be deemed to have conceded the right to the traders to use these wagons as shops during the four days—during the period which they admit to be covered by the rate. I do not so regard it at all. I regard

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them as trying to fix an extreme limit up to which they are content to bear the obligation of carriers, and to deem it as covered by the rate—and they make it an extreme limit in order to meet the exigencies of the consignees.

That being so, it seems to me that the accommodation now given, which is limited to four days' use of the sidings, in return for the rate which is received, coupled with an intimation that they will make a charge afterwards for something for which they made no charge before, namely, warehouse accommodation, does not constitute an increase of any charge, direct or indirect, and therefore I do not think the case is made out.

But in order to see a little more closely how this matter arises, I had better refer to the sections which govern it. The third section of the Provisional Order Confirmation Act affecting this railway gives to the carrier the right of imposing a station terminal; at all events it fixes the amount of that station terminal in these words: "The maximum station terminal is the maximum charge which the company may make to a trader for the use of the accommodation (exclusive of coal drops) provided and for the duties undertaken by the company for which no other provision is made in this schedule, at the terminal station for or in dealing with merchandise as carriers thereof, before or after conveyance." Now, therefore, that covers the carrier's obligation up to the determination of everything that is done at the terminal station in dealing with the merchandise after conveyance as carriers. It covers nothing more. Then it was thought fair that there should be a statutory provision whereby a carrier who had completed the contract of carriage might, if the facts admitted of it, make a demand for after accommodation received from him by the trader, and that was dealt with in sub-section 4 of section 5. After saying the company may charge for the services hereunder mentioned, it, by sub-section 4, refers to the service in question in these words: "The detention of trucks or the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof or the consignor or consignee to give or take delivery thereof." Now, I have pointed out that the

extreme limit of time, it seems to me, up to which the carrier's obligations can be deemed to exist is certainly not later than four days. By this Act which I have just referred to the carrier for the first time acquires a statutory right to make a charge for after accommodation. Whether or not he had a common law right it is not necessary to decide. At all events it would have been safer to make an agreement if he wanted to enforce it. From and after the passing of that Act, there is no doubt that he has a statutory right to make it, and if never having made it before—if having merely given some gratuitous accommodation before, he afterwards, by virtue of the statutory right conferred upon him, makes a charge he had not made before, it seems to me that is not an increase of any rate or charge. It was not presented to us in that way in argument, and if it had been I do not think it would have constituted an increase of rate. Therefore, I do not think that there has been any increase of rate, direct or indirect, in this matter. If I were wrong in supposing that there had been none, and if it were necessary to say, which I do not think it is, that the period of a reasonable time for taking delivery would have to be postponed a little beyond the four days, I should myself think that the change now made has been justified by the altered circumstances at the time when the new arrangement was made. I think that it has been proved that the traffic upon the railway has been increasing—that the effect of that is that the grace theretofore accorded to traders became impracticable, having regard to the convenience of all parties, of continuance; that certain persons abused it—abused it to the injury of others who were willing and desirous of using the sidings fairly, and it became necessary therefore to limit the use of those sidings which were primarily for the convenience of carrying out the carrier's duty for the benefit of the carrier as much as that of the consignee. It became necessary to take steps to limit the use of them as far as possible to those who were using them for purposes incident to the carrier's business. It seems to me it was quite reasonable that some arrangement should be made whereby it should become a matter of payment on the part of the consignee if he used the siding beyond such time as was necessary for the discharge

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of the carrier's duty and the receipt by the consignee of the goods from the carrier. I think it became quite necessary to make some arrangement of that kind, and therefore I think it justified in this case the making of some arrangement. I say the making of some arrangement, because as to the quantum demanded from the persons who do accept the privilege of keeping their goods there beyond the period covered by the carrier's rate, that is not a matter for our consideration at all. That is a matter expressly left to be dealt with, not as between a general body such as the applicants in this case, but as between the individuals who suffer and the railway company who impose the charge. That is a question expressly reserved for the consideration of an arbitrator, and I think that when the question is raised between any trader and the company as to whether or not the sum demanded from him in respect of the use of the siding after the carrier's contract has expired, is reasonable, that is a question to be decided by reference to all the circumstances of the case. I am not for a moment deciding or suggesting that the particular sum charged by the railway company here is or must be a reasonable charge to every trader, I think that that is a question which could only be decided by reference to each particular case, and I can perfectly well conceive cases—I am giving no opinion upon it because it is not a matter for me to give an opinion upon: it is a matter for the decision of the arbitrator—but I can conceive cases where a small trader may have been induced to embark his capital in the coal trade with a reasonable expectation that his shop or depôt would be found for him, and who finds himself suddenly cut off from that facility. It may be that that would be a consideration which an arbitrator might entertain in dealing with what particular sum it would be fair to charge to that trader for the use by him of the company's sidings. We are giving no opinion upon that matter at all. The matter of amount is entirely outside our decision to-day. We are deciding this case simply on the legal principles applicable to it, and I have no hesitation in holding for the reasons I have given that no increase direct or indirect in any charge actually made has been proved in this case, that the railway company are therefore not called upon

for a justification, and I go further and say that if I am wrong in my inference that there has been no change in the accommodation given in return for the rate, still if there has been any change, I think that the circumstances under which this new arrangement has been made are such as to justify the company in limiting the accommodation given under the contract of carriage to four days after notice that the wagon is in position at the disposal of the consignee. As to the point that the new arrangement is *ultra vires*, it follows from what I have already said that it was quite within the competence of the company to name a limit beyond which they refused to be bound as carriers. I think the application must be dismissed.

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SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitor for the applicants : *George Turnbull*, Bradford.]

Solicitors for the railway company : *Woodcock, Ryland & Parker*, for *Moorhouse*, Manchester.]

MIDLAND RAILWAY COMPANY

v.

BLACK AND OTHERS ⁽¹⁾.

Siding Rent—Reasonable Sum—Reasonable Time for Unloading—When commences to Run—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, Schedule, sections 5, 25—Board of Trade Arbitrations, &c. Act, 1874 (37 & 38 Vict. c. 40), s. 6.

November 16,
17, 18, 1899.

The Midland Railway Company's Rates Order Confirmation Act, 1891, section 5 of the schedule, provides that they may charge a reasonable sum by way of addition to the tonnage rate for certain services rendered to a trader at his request or for his convenience, including (*inter alia*) the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the consignee to take delivery of the merchandise, and for services rendered in connection with such use and occupation.

The Midland railway company claimed under this section the sum of 6*d.* per truck per day, as siding rent, at Sheffield, after the expiration of four clear days allowed for unloading.

Held, that 6*d.* per truck per day was a reasonable sum to apply to all traders at Sheffield and similar places, though it would not necessarily apply to other places, *e. g.*, rural stations, where the cost of the construction of sidings might be less, and the cost of working might be more, in proportion to the quantity of traffic; and where the loss of business by the blocking of the siding might be greater or less according to circumstances.

That in ascertaining the "reasonable sum" to be charged under this section the cost of maintenance should only be considered where it exceeds that which would be incurred if delivery were taken within the four days, and only those services in excess of those which would be otherwise performed are to be taken into consideration. Likewise the cost of accommodation is only a factor in cases where extra accommodation has to be provided owing to the trader's habitual delay in unloading.

Held, further, that four days, exclusive of the day on which the notice of arrival was given, was a reasonable period for unloading; that although, *prima facie*, this time would not begin to run until the trucks were in the siding, handed over to the trader, ready for unloading; yet if the trader were not ready to take delivery, the siding being blocked by him, the time ran from the moment the railway company were ready to send the trucks to the siding; while, if the

(¹) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

railway company were in default, the trader would have his remedy under the contract for delivery.

Held, further, that the contention that when the railway company got the benefit of the expedition of traders in ninety per cent. of the traffic, which was unloaded within the four days, there should be some "set-off" to the traders as regards traffic detained after the four days, was untenable; since the period of four days was not a matter of right, and the character of the railway company would change after the four days had expired from that of a "carrier" to that of a "bailee"; and that therefore the Court would not compel the railway company, directly or indirectly, to give the traders the benefit of a former system of "averaging" the number of days.

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THIS was a reference under the Board of Trade Arbitration Act, 1874, section 6.

By section 5 of the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, it is provided that the company may charge a reasonable sum by way of addition to the tonnage rate for certain services rendered to a trader at his request, or for his convenience, including (*inter alia*) the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the consignee to take delivery of the merchandise, and for services rendered in connection with such use and occupation. And, further, that any difference arising under that section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party.

The Midland railway company having claimed, under this section, the payment of 6*d.* per truck per day, after the expiration of four clear days allowed for unloading, a difference arose which was referred by the Board of Trade to the Railway Commissioners.

C. A. Cripps, Q.C. (*Ernest Moon*, and *Noble* with him), for the Midland railway company.

In order to arrive at a reasonable charge under this section, the railway company have first taken the cost of accommodation provided in Sheffield for all purposes; from this they have eliminated the cost properly attributable to the coal traffic alone, including the cost of land, works, and sidings. They have then taken the average number of trucks employed in connection with the coal traffic at Sheffield—and they have thus obtained a

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certain sum in the way of cost per truck per day. Next the cost of dealing with the traffic has to be arrived at, that is to say, in the words of the section, the cost of "services rendered in connection with such use and occupation," which they work out at so much per truck. Seeing that the total comes to between 10*d.* and 11*d.*, the railway company have not based their charge of 6*d.* on too high a scale.

T. W. Chitty, for the respondents :

By the station terminal, which was chargeable under section 3 of the same Act, the railway company have already got back their interest on the capital expenditure on the siding, and also the cost of maintenance. These items, therefore, can not be estimated as part of a "reasonable charge" under section 5.

[WRIGHT, J. : The cost of maintenance may have to be considered, in so far as it exceeds what would be incurred if the delivery were taken within the four days.]

In fixing the charge, the number of trucks using the station should not be taken, but the station capacity, or one truck might pay the interest on the capital for a siding that would hold a hundred trucks ; and also there would be no allowance for increase of traffic.

The only "services" the railway company can mention is shunting, which is not a service rendered to the trader at his request or for his convenience. After the four days have expired no services are rendered at all (except the final service of taking the truck away, which is rendered in any case), as the truck reaches the "dead end" and remains unmoved.

The time cannot begin to run when the truck arrives at some outlying siding at Sheffield, it must be at its destination, and in a position to be unloaded. The company can make no charge under this section for the detention of their trucks, which is "demurrage," with a fixed charge of 3*s.* per day. Supposing the trader orders a truck of coal to be delivered daily, and the railway company deliver six trucks together at the end of the week, four days would be an unreasonable time to unload in. The railway company have been overpaid on the station ter-

minal, the great majority of trucks are unloaded within the four days, many on the day of arrival; this should be "set off" against the trucks detained after the four days. The "average system" is the only fair one.

The words "in addition to the tonnage rate" show that an entirely fresh charge is not intended.

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WRIGHT, J. : We have to decide in this case on what principle the Registrar is to proceed in dealing with the details of certain differences which have arisen at Sheffield, and at Sheffield only. There is a small percentage of the cases there in which the traders find a difficulty in unloading coals from their trucks at the sidings within a period of four days; but that small residue of cases is important. It is important to the trader, and it is important to the railway company. The difficulty which arises from unloading within four days may depend either upon the traders' defective arrangements or accidental necessities, or upon defects of management or accidents in the conduct of the railway company's business. The importance is because the accommodation in places like Sheffield is necessarily limited, and the railway company require to utilise every yard of siding that they can, partly to earn terminals on any traffic, whether in their own wagons or otherwise, and partly in order that they may utilise their own wagons as machines for earning profit. Now the railway company are not bound to find warehouse accommodation beyond a reasonable time for the traders to take delivery unless the railway company are paid for it, and if they find it inconvenient or expensive to allow the trucks to remain beyond a reasonable time for unloading them, the company are entitled to make a reasonable charge for such accommodation.

The points of difference here are, first, whether the railway company ought to be compelled, directly or indirectly, to give to the traders the benefit of the system which they once had, and which has been described as the system of average. That is the first question. The second question is, what, at Sheffield, or at certain stations or depôts there, is a reasonable period of time to allow traders before they become subject to a special charge to be made for prolonged occupation of the sidings, and

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that includes the determination of the important question at what point that period ought to commence to run. The third question is, what at those places is a reasonable charge to allow in respect of the prolonged occupation.

As to the first question, the question of averaging, we need not say anything about the power of the Court to order railway companies to adopt any such system in cases where no charge is sought to be made, because of course the companies could (subject, of course, to the jurisdiction of this Court to order due facilities) act on their own view of what is a reasonable time for them to allow trucks to remain on their premises, if they do not want to make any charge for the continued occupation. The House of Lords has decided ⁽¹⁾ that if they seek to make a charge for the continued occupation, then the tribunal—which in this instance is this Court—which deals with the charge must take into consideration the question of what is a reasonable time; but they have nowhere said that any such matter as this, of averaging, could be dealt with as against the railway companies, where no charge is sought to be made. Whether we have power to do it directly I do not know. Whether we have power to do it as regards the charge will be another matter; but I think we are all of us of opinion that we cannot force any system of that sort on the railway companies in any sense whatever.

Then the next point is as to the reasonable time. The question is one which does not arise now for the first time. There have been, I think, two cases ⁽²⁾ at any rate in which four days has been regarded in this Court as a reasonable time, without express reference to any particular description of traffic or any particular kind of station. I think that in all the cases before us the period of four clear days is a reasonable period. Then how is that to be calculated? Four clear days appears to have been adopted by a great number of railway companies; and with the exception of one time, when it was five days, so

⁽¹⁾ *Midland Ry. Co. v. Loseby and Carnley*, (1899) A. C. 133; *ante*, *Digest*.

⁽²⁾ *Midland Ry. Co. v. Sills*, *ante*, Vol. IX. 161; *Manchester and Northern Counties Federation of Coal Traders' Associations v. Lancashire and Yorkshire Ry. Co.*, *ante*, p. 127.

far as I can discover, four days has been the time most usually allowed. How is that time to be reckoned? As I have said, *prima facie* the four days, or whatever the other reasonable time might be, would not begin to run until the trucks are in the siding where they are to be unloaded, and are handed over there to the trader ready for unloading. In this case, to take one of the illustrations, the trucks consigned to a trader at Wicker would be trucks in the case of which the four days would not *prima facie* begin to run until the trucks arrived at Wicker. But Grimesthorpe is the same thing as Wicker in those cases, and in those cases only, in which it is the trader's fault that he is not ready to take delivery at Wicker; and he is not ready to take delivery at Wicker of trucks which he is not ready for. We should be nullifying the time limit altogether if we were to hold that the time does not run till the trucks are alongside at Wicker in a case where the very reason why they do not get alongside is because the trader has more than he has room for, or blocks the siding for a time beyond the four days. When the trader has room at Wicker the time will not run till the trucks are delivered there. When the company are ready to deliver at Wicker, and the trader, because of trucks which he has postponed the unloading of beyond the four days, cannot take more trucks at Wicker, the company necessarily are entitled to keep the trucks at Grimesthorpe, and are entitled to charge as from the time when they are ready to send them on from Grimesthorpe to Wicker. In so far as the delay is caused by the trader having delayed unloading beyond four days, and by his inability to take delivery, because there is not enough room at Wicker as there ought to be, it is the trader's fault. On the other hand, if there is any default by the company they must answer it. Supposing, for instance, according to the course of business and the order of the trader, one truck a day ought to be forwarded to a trader, and several days' trucks are accumulated; or supposing his orders as to the number of trucks to be forwarded and their proper succession are unduly disregarded; or supposing that there is an undue delay of a consignment which causes the loss of a market: in all those cases so far as the railway company are in default the time ought not

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to be considered as commencing to run until their default is remedied.

Then the remaining question is as to the amount to be charged. I think that in this case 6*d.* per truck per day is not too much. I do not quite agree that it is built up as Mr. Turner's table builds it up. I think it is right to take into consideration the elements which he worked out in his table, but not to the full extent. It seems to me that the cost of providing the land and the sidings could only be considered in so far as regards the provision necessary to be made for the period beyond the four days. As regards the cost of working, I think it is only the increase of the cost of working beyond what would be required if the trucks were cleared in four days that can be considered at all. But the principal consideration is that the company, by a siding being unduly blocked, are *pro tanto* deprived of the power of doing their business; and that in two ways. They are deprived of terminals which would be earned on other traffic, and they are deprived of the opportunity of using their own wagons which could be earning profits. The 6*d.*, as has been pointed out by Sir Frederick Peel, is, to some extent, supported as a proper charge by the circumstance that Parliament has allowed 3*d.* a ton, which, on the eight tons in the truck, works out at the same figure for four days. Then Mr. Chitty, on this part of the case as to the charge, raised a point which is of great importance, and, *prima facie*, one which has a great deal in it. He said it cannot be reasonable to pay the company 6*d.* per day beyond the four days in cases in which, as in the majority of cases, the bulk of the traffic is unloaded by the traders within four days; so that the company getting the benefit of the accommodation saved by that expedition on the part of the traders as regards something like 90 to 95 per cent. of the traffic, it cannot be fair that the company should have that advantage, and also be paid for what happens after the four days. But I do not think such a matter of set-off as that it is competent for us to consider. The trader has no right to the four days. It is not as if he waived anything by unloading within four days. The trader is bound to discharge in a reasonable time. If it is reasonable for him to discharge in two or

three days, and he does so, it is no more than his duty, and, as Sir Frederick Peel pointed out, after the four days, supposing the four days is the right time, the character of the company is a new and altogether different one. He is now a warehouseman; and how can the amount which he is entitled to charge for warehousing these trucks (warehousing is hardly the right word for it, but it conveys what I mean) be affected by the circumstance that he has not been put to all the expense as a carrier or as a conveyor of the traffic to which he might have been subjected?

In coming to these conclusions I wish to say for myself generally, that of course they apply of themselves only to the cases before us—only to Sheffield and the particular traders who are before us. I should think they would probably be found applicable to all the traders at Sheffield, and to places similar to Sheffield; but they will not necessarily apply to other places, as, for instance, to a rural station. Probably the cost of construction of the sidings at a rural station might be much less; the cost of working might possibly—I do not know—in some cases be more in proportion to quantity at a rural station; the loss of business by the siding being blocked up, and it being impossible to employ wagons, might be more or less; and therefore I do not wish for myself to say anything as to any other case, except the cases of traffic similar to that of Sheffield.

SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitors for the Midland railway company: *Beale & Co.*

Solicitors for the respondents: *Turnbull & Turnbull, Bradford.*]

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MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY

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PIDCOCK AND COMPANY ⁽¹⁾.

Services rendered at or in connection with Sidings not belonging to a Railway Company—Reasonable Charge for Station Terminal—Railway Rates and Charges (No. 12) Order Confirmation Act, 1892, s. 5 of the Schedule.

July 17,
October 29,
1896.

Section 2 of the schedule to the applicants' Railway Rates and Charges Order Confirmation Act, 1892, enacts that the maximum rate for conveyance is the maximum rate which the railway company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the railway company, and every other expense incidental to such conveyance not thereafter provided for in the schedule.

Section 3 of the same schedule enacts that the maximum station terminal is the maximum charge which the railway company may make to a trader for the use of the accommodation provided, and for the duties undertaken by the railway company for which no other provision is made in the schedule, at the terminal station for or in dealing with merchandise, as carriers thereof, before or after conveyance.

Section 5 of the same schedule enacts that the railway company may charge a reasonable sum, by way of addition to the tonnage rate, for services rendered to a trader at his request, or for his convenience, "at or in connection with sidings not belonging to the company . . . provided that where, before any service is rendered to a trader, he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request, or for his convenience."

Held, that the tonnage rate authorized by section 2 of the schedule is for conveyance by merchandise train and any work incidental to such conveyance, and for the performance of which it is reasonable to use the train engine (*e.g.*, when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require); but that conveyance other than this off the main line does not come within section 2.

Held, further, that a station terminal is for use of the accommodation or staff of a terminal station after conveyance is at an end; and goods arriving at a station

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

to which they are consigned for delivery, and which upon arrival have to be hauled a greater or less distance to be in a position where they can be unloaded and delivery given, are liable to a terminal charge.

The respondents were the owners of a siding which had been held to be a siding not belonging to the railway company⁽¹⁾. The siding had no direct connection with the up and down main lines, being separated from them by the railway company's goods yard at Retford station. Traffic, therefore, to and from the siding had to pass over the station sidings, and the service of taking it across was done by the railway company. This service was claimed to be one performed "at or in connection with" the traders' siding; and the railway company asked to be allowed to charge for it the same sum that they charged as a station terminal to traders who came under section 3 of the schedule.

Held, that such service might be charged for under section 5 of the schedule, even though it was a service which was involved in delivery, and which the trader could not himself perform.

Held, further, that the railway company being relieved, by the provision of the siding, from the expense of finding standing room for trucks and space for loading and unloading, that three-fourths of the sum which they charged as a station terminal at their Retford station, in respect of merchandise similar to the respondents' and liable to such terminal charge, was a reasonable sum to be charged to the respondents for services rendered by the railway company at or in connection with the respondents' siding at Retford.

THIS was an application under section 6 of the Board of Trade Arbitrations Act, 1874, and under section 5 of the schedule to the Manchester, Sheffield and Lincolnshire railway company's Rates and Charges (No. 12) Order Confirmation Act, 1892.

The applicants claimed to be entitled under section 5 of such schedule to charge a reasonable sum for services rendered at or in connection with the respondents' siding at Retford—such services being rendered at their request or for their convenience. The section provides that any difference arising under it is to be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party.

The applicants gave particulars of the services they claimed for, stating that there being no connection, and no means of making one, between the applicants' main line and the respondents' siding, the whole of the respondents' traffic had to be first placed in the applicants' station sidings and also that accommodation had to be provided there for it. The applicants claimed one shilling per ton for the services rendered and one shilling per ton for the accommodation afforded.

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The applicants' particulars were as follows :—

" 1. Details of the services rendered in connection with the inwards traffic received by the respondents at their siding, as also of the points at which such services are rendered, and which traffic arrives from three different directions, (a) east, (b) west, and (c) from the Great Northern railway system.

- (a) The greater portion of the traffic arrives from the east, and as there is no connection and no means of making one between the applicants' main line and the respondents' siding, the whole of this traffic has to be first placed in the applicants' station sidings on the south or down side of their main line, which is on the opposite side thereof to the respondents' siding.
- (b) The traffic from the west is put into the applicants' station sidings on the up side of the line, except on the very rare occasions when the circumstances of the traffic will enable it to be put direct into the respondents' sidings and they are ready to receive it.
- (c) The traffic from the system of the Great Northern railway is brought by a Great Northern company's engine, mixed indiscriminately along with other traffic for traders at the station and for two other private sidings having connection therewith. The whole of this traffic has to be placed in the applicants' station sidings on the up side of their main line and there sorted, so that the applicants' traffic can be picked out and placed in their siding.

" With regard to the whole of the respondents' traffic placed in the applicants' sidings, each wagon on its arrival has to be advised to the respondents as a consequence of not being able to place the same direct into their siding, and a record of each wagon has accordingly to be kept by the applicants from which the advice note is made out on a form for that purpose, and afterwards delivered to the respondents. The respondents upon receipt of such advice notes send to sample the grain in the wagons, and if satisfactory to them, they subsequently give instructions to the applicants for the wagons required to be

placed in their siding, and the applicants then perform the necessary shunting for that purpose.

"The moving of these wagons from the applicants' sidings to the respondents' siding necessitates the performance of shunting operations, which occupy an engine and two shunters from twenty minutes to an hour and a half on every occasion.

"The respondents also require the applicants, from time to time, to remove the wagons which are in the respondents' siding from one door of their malt kiln to another, to perform which service the following procedure has to be gone through:—

"An engine and two shunters have to be sent to the siding, and all wagons standing below the crossing at the end of and opposite Messrs. Gilstrap, Earp & Co.'s kilns have to be pushed up into the respondents' siding. Then the wagons they require removing from one door to another are coupled to the before-named wagons and placed at the particular door at which required. After this the wagons which have had to be pushed up to get to the said siding are drawn down to the position they originally occupied opposite and below Messrs. Gilstrap, Earp & Co.'s kiln. This occupies on an average about thirty minutes.

"2. Particulars of the accommodation used and occupied by the respondents (1) before and (2) after conveyance.

(1) Before conveyance can only apply to outwards traffic which is hereinafter separately dealt with.

(2) The respondents' siding is not capable of holding all the wagons that come at one time into the applicants' station consigned to the respondents, and consequently the applicants have to provide standing accommodation in their siding for such extra wagons until the respondents are in a position to receive them into their siding. The wagons are also kept standing in the applicants' sidings after the respondents have been duly advised of their arrival and whilst the respondents are taking samples of the contents, and generally until it suits their convenience to order them to be placed in their siding.

"With regard to the forwarded traffic from the respondents'

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siding, the details and particulars under items Nos. 1 and 2 are that this traffic, not being handed by the respondents to the applicants at any given time owing to the limited accommodation at the respondents' siding, the services necessarily rendered by the applicants are that the forwarded traffic has to be removed and placed in the applicants' station sidings from time to time, entailing a considerable amount of shunting in order that other empty wagons or wagons containing received traffic may be shunted out of or placed in such sidings, and there the wagons containing the respondents' traffic have to await the arrival of the various trains, including the pilot of the Great Northern railway company for the traffic on their system, so that the whole of the traffic may be conveyed to its respective destinations; in consequence of which the applicants have to afford the accommodation of their sidings for the wagons to stand in whilst they are so waiting, in order that the respondents' outward traffic may be effectually and properly dealt with.

"3. Other than and in addition to the requests which are, and have been, from time to time made by the respondents to the applicants in the course of the daily communication which takes place between their respective servants, having reference to the dealing with the traffic, the services and accommodation mentioned in the foregoing particulars were rendered and afforded for the convenience of the respondents.

"4. The applicants claim to be entitled to charge for the services rendered under item No. 1 a sum of 1s. per ton on the respondents' traffic, and they also claim to be entitled to charge for the accommodation afforded under item No. 2 a sum of 1s. per ton on the respondents' traffic."

The respondents contended that all the services alleged to be performed by the applicants were incidental to conveyance, and not the subject-matter for any additional charge; or alternatively, that they were for the convenience of the applicants themselves: and that they were not services provided at or in connection with the siding.

They further contended that if the applicants were entitled

to additional payments in respect of any of the said services, separate amounts should be allocated to each distinct service, in order that the respondents might give notice in writing in respect of any of such services, that they did not require them.

The applicant company proved that the respondents' traffic must make use of station accommodation, prior to being put into their own siding, owing to the siding not being connected directly with the running lines of the company.

Asquith, Q.C. (Noble with him), for the applicants.

The services rendered to the respondents are identical in character with the station services performed for other traders, for which terminals are chargeable. The point of conveyance ceases when the running ceases; the moment the traffic leaves the running line, services are rendered to the respondents "at or in connection with a siding not belonging to the company." If the respondents are entitled to similar and even greater services than other traders, without any payment except the conveyance rate, there will be an undue preference between those who have and those who have not private sidings, which the 4th section of the Railway and Canal Traffic Act, 1894, is intended to prevent.

Balfour Browne, Q.C., and C. A. Cripps, Q.C. (R. Whitehead with them), for the respondents.

The services under section 5 of the schedule are those which a trader may, if he wishes, dispense with. If the respondents asked for this shunting in the station to be dispensed with, the applicants would be unable to deliver as they are bound to do. The trader has a right to give notice to dispense with services, and to demand delivery. No delivery can take place short of the entrance to the private siding. Shunting is an incident in conveyance. The conveyance rate covers everything except the use and accommodation at a place where a truck is loaded or unloaded, as is shown by the definition of "terminal station" in all the Charges Order Confirmation Acts.

In *Watkinson v. Wrexham, Mold and Connah's Quay Ry. Co. (1)*,

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Asquith, Q.C., in reply.

Notice to the railway company to abandon services necessary for the delivery of goods would exonerate the company from such delivery.

COLLINS, J.: I agree in the judgment about to be read by Sir Frederick Peel in this case.

SIR FREDERICK PEEL: By the Manchester, Sheffield and Lincolnshire Rates and Charges Order Confirmation Act, section 3 of the schedule, the railway company may make charges for accommodation and services at the terminal station "in dealing with merchandise as carriers thereof, before or after conveyance." A terminal station, however, is defined not to include "a junction between the railway and a siding not belonging to the company, or, in respect of merchandise passing to or from such siding, any station with which such siding may be connected." By section 5 of the same schedule it is provided that a railway company may charge a reasonable sum, by way of addition to the tonnage rate, for services rendered to a trader "at or in connection with sidings not belonging to the company."

It is upon this 5th section that the railway company in this case base their claim to be paid a sum in addition to the tonnage rate in respect of the respondents' traffic, and apply to have its amount fixed. That traffic, consisting chiefly of barley and malt, uses a siding which does not belong to the railway company, and is therefore not liable to a station terminal under section 3. The siding, however, is in a position which is somewhat peculiar. Though not a siding belonging to the railway company, it is on land which is part of their Retford station;

it has, however, no direct connection with the up and down main lines, and is, indeed, separated from them by the company's goods yard. Traffic, therefore, to and from the siding must pass over the station sidings, and the service of taking it across is done by the railway company. This service is claimed to be one performed "at or in connection with" the traders' siding; and the company ask to be allowed to charge for it the same sum that they charge as a station terminal to traders who come under section 3 of the schedule. The respondents object to any sum being allowed, on two grounds. First, they say that the shunting across the goods yard and over the station sidings is an incident of conveyance, and is covered as to charge by the conveyance rate: that the railway company contract to convey and deliver, and that conveyance does not cease until the goods are in the right place for delivery, which, if a private siding, is its junction with the company's railway, or if a station, that point in the station where the traffic can be loaded or unloaded. Up to this point a station terminal does not, in their view, begin to be chargeable; and, similarly, the shunting of goods into a private siding is not, they say, one of those special services to which alone section 5 applies, for the goods are still in the course of transit, and the conveyance rate is the payment for the work.

Now the question we have to determine depends, I think, not so much upon where in a general or common law view of a carrier's duties conveyance ceases in a contract of carriage, as upon the meaning the word "conveyance" bears as used in the Railway Companies' Rates and Charges Order Confirmation Acts, and the services to which the charges authorised by those Acts are respectively applicable. And, first, the conveyance rate authorised by section 2 is the rate a company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise provided for. The rate, therefore, is for conveyance by merchandise train, and this will include any work which is incidental to such conveyance and for the performance of which it is reasonable to use the train engine, as for example,

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when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require. But conveyance other than this off the main line does not seem to come within section 2; and, further, to hold otherwise would be giving the word "conveyance" a meaning beyond its ordinary sense in the language of railway Acts according to the decision in *Hall's Case* ⁽¹⁾, where it was defined by the Divisional Court on appeal from this Court as comprehending such work only as in the early days of railways was performed by a railway company acting as conveyors only and not as carriers as well, and as was capable of being measured by a reference to distance travelled. Taking subsequent Acts as using the word in the same sense, this is all the service for which the conveyance rate is the remuneration; and as to a carrier's further duties under a contract to carry, there is, first, section 3, which authorises a charge for accommodation provided or duties undertaken by a railway company at a terminal station for or in dealing with merchandise as carriers thereof before or after conveyance. A station terminal, therefore, is for use of the accommodation or staff of a terminal station after conveyance is at an end; and understanding "conveyance" in the sense to which it is restricted by *Hall's Case*, goods arriving at a station to which they are consigned for delivery, and which upon arrival have to be hauled a greater or less distance to be in a position where they can be unloaded and delivery given, are liable to a terminal charge. In the case of Retford station, the terminal which the traders who use that station pay is as much for the hauling of their trucks to the sidings where they can unload them as for anything else; and the traffic of the respondents at Retford requiring exactly the same haulage after conveyance as other traffic, the applicants claim to be paid by Pidcock and Company, as by others, what they conceive to be a reasonable sum. They admit that they cannot claim this sum as a station terminal, but they claim it

⁽¹⁾ *Ante*, Vol. V. 28.

under section 5 of their Act, which provides that a reasonable sum may be charged for services rendered at, or in connection with, a siding not belonging to the company. As to this section 5, however, the respondents say (and this is their second ground of objection) that admitting a service to be rendered for which a charge might be made, it cannot be charged for under section 5, because, as they contend, the only services that come under that section are such as a trader may dispense with and be able, if he wishes, to perform for himself, and that the service in question is one of which the company, as carriers, could not be relieved. But I cannot say I find any such limitation to the services to which section 5 applies, for all that it enacts is that a trader shall not be liable to pay for any service as to which he has given the railway company notice that he does not require it. It need not be a service which he can himself perform. Pidcock and Company, for example, could not haul to their own sidings, but they might give the applicants notice that they did not require them to deliver at the siding, and in such case the railway company would have immunity for not so delivering, and could not charge if they disregarded the notice. But that is not this case.

Here the applicants deliver at the private siding at the respondents' request, and for their convenience; and the service they perform in doing so is, I think, a service in connection with the siding, and one for which section 5 entitles them to be paid a reasonable sum. This sum we fix at three-fourths of the amount which the company charge as a station terminal, and which in case of difference can be ascertained on the proportional principle referred to in our last year's judgment ⁽¹⁾. By providing their own siding the respondents relieve the applicants from the expense to which they are put in the case of other traders, in finding standing room for trucks and space to load and unload in; and on this ground we think there should be a difference of one-fourth in the terminal charge imposed on them as compared with the charge imposed on others.

One other point remains to be noticed. The far end of the

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siding where Pidcock and Company load and unload is at some distance from its junction with the railway, and the railway company, besides delivering at the junction, take the trucks on to the further end of the siding. This, of course, is a voluntary service on their part, for no company is bound to travel beyond its own railway; and it may be doubted whether section 5 applies, or should be applied to a service which a company cannot be called upon to perform: for where an individual requires a service which he cannot have unless the company is willing to undertake it, it would be futile to fix any other sum to be paid for it than what the company think ought to be paid. This seems, therefore, more a matter for private arrangement, but it may be observed that if it is convenient to the respondents to have their trucks hauled to the end of their siding, where they are opposite to their malt kilns, it is not less so to the applicants that the trucks should be where they are least in the way of themselves using the siding. They have the right under the agreement for the siding, subject to the owners' use of it, to use it themselves in shunting engines and trucks; and in the year ended July last they stood as many as 1,323 trucks on the siding. In practice they do not limit the use they make of the siding to shunting, but they also load and unload upon it, and it would not seem to us an unfair bargain if in return for the concession the respondents make in this respect such engine work as they require on their siding were provided by the applicants free of charge.

LORD COBHAM: I quite concur in the judgment just delivered.

[Solicitors for the applicants: *Cunliffes and Davenport*, for *R. Lingard Monk*, Manchester.

Solicitors for the respondents: *Neish, Howell and Macfarlane*.]

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v.

SALT UNION, LIMITED ⁽¹⁾.

Services rendered at or in connection with Sidings not belonging to a Railway Company—Shunting—Signalling—Cost of erecting Signal Cabins and Signals at junction with private Sidings—Railway Rates and Charges (No. 17) Order Confirmation Act, 1892, ss. 5 and 7 of the schedule.

A railway company cannot charge beyond the conveyance rate for anything done on their own lines which is properly incidental to conveyance or collection of traffic to or from private sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect.

*December 16,
16, 1897,
January 21,
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But a railway company may be entitled to make a service charge if they are required for the convenience of the siding owner to do work on his siding, and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge.

Section 5 of the schedule to the North Staffordshire Railway Rates, &c. Order Confirmation Act, 1892, enacts that the railway company may charge in addition to the tonnage rate a reasonable sum for certain services rendered to a trader at his request or for his convenience, including (*inter alia*) services rendered by the company at or in connection with sidings not belonging to the company and the collection or delivery of merchandise outside the terminal station.

Under this section the railway company claimed payment for shunting services performed by them in respect of the Salt Union traffic to or from their sidings at Malkins Bank and Wheelock respectively. The traffic was salt outwards and coal inwards; and it was proved that as the works at Malkins Bank were in three sets or separate parts, and there were several points at which they communicated by sidings with the railway, the business of delivering full coal trucks and collecting loaded salt vans, and of bringing back and taking away empties, was considerable. The Salt Union sent a man to meet each train as it arrived, and he pointed out the particular sidings into which he desired trucks inwards to be put, or in which there were loaded salt vans to be hauled out. The railway company calculated that the time their goods trains were detained

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBAM, sitting at the Royal Courts of Justice, London.

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while the train engine was occupied in uncoupling trucks intended for delivery at the junctions, and in picking up trucks ready to go in the direction in which the train was travelling, averaged per diem at Wheelock one hour, and at Malkins Bank one hour and some minutes.

Held, that if the time occupied by the railway company's engine at the Salt Union's request or for their convenience in shunting the Salt Union's traffic to or from their Malkins Bank sidings exceeds for each train twelve minutes, and to or from Wheelock sidings exceeds six minutes, that the railway company may charge the Salt Union for time over the said twelve minutes and six minutes respectively during which the railway company's engine is occupied in shunting such traffic at the rate of 7s. per hour.

The railway company maintained a small staff at Malkins Bank to look after the siding traffic, and to superintend the working of it to and from the main line. The traffic was partly Salt Union and partly that of another firm of traders, and the railway company claimed that the expense, which was about 100*l.* a year, should be borne by the two firms in the proportion of the tonnage dealt with.

Held, that as the service the staff performed was a necessary one, and of a sort for which when done at a station a charge in addition to the tonnage rate would be allowed, the railway company were entitled to be paid by the Salt Union the expense they claimed from them.

By section 7 of the schedule to the North Staffordshire Rates, &c. Order Confirmation Act, 1892, it is provided that "nothing herein contained shall prevent the company from making and receiving in addition to the charges specified in this schedule, charges and payments by way of rent or otherwise for sidings or other structural accommodation provided or to be provided for the private use of traders and not required by the company for dealing with the traffic for the purposes of conveyance, provided that the amount of such charges or payments is fixed by an agreement in writing signed by the trader or by some person duly authorized on his behalf, or determined in case of difference by an arbitrator to be appointed by the Board of Trade."

The premises of the Salt Union, Limited, are connected at Malkins Bank and Wheelock with the railway of the North Staffordshire railway company by means of sidings not belonging to the railway company. The railway company claimed to charge the Salt Union under the above enactment by way of rent or otherwise for the erection of signal cabins, signals and other structural appliances for the private use of the Salt Union at Malkins Bank and Wheelock. It appeared that at the time the Salt Union made their junctions, and for long after, the branch railway on which they were situated was only a goods and mineral line. In 1893 the railway company converted such branch into a passenger line, and the works in question were provided by them to meet the Board of Trade requirement that home and distant signals should be provided at siding junctions before a railway company are allowed to carry passengers.

Held, that the railway company could not recover from the Salt Union the expense of providing such signals at Malkins Bank and Wheelock, they having incurred such expense solely to satisfy the Board of Trade that the line might with safety be used as a passenger line, and to obtain the Board's sanction to their acting as carriers of passengers, and not for the purpose of facilitating siding traffic, but to benefit the railway company themselves and the public.

Held, further, that such signals were not within section 7, not being works

provided for the trader's private use, and "not required by the company for dealing with the traffic for the purpose of conveyance."

Semble, that such works belong to the railway and are charged for in the rate for conveyance, as part of that rate is for "the use of the railway."

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The railway company also claimed under section 5 of the schedule to their Rates, &c. Order Confirmation Act, to be repaid the cost of working such signals in connection with the Salt Union sidings.

Held, that the reasons stated by the Court for not allowing a charge to be made for the cost of providing the signals extended to the working of them, but that if the Salt Union paid anything for signalling or signalmen before 1893 (when the railway was converted into a passenger line), they should continue to do the same for the time since.

THIS was an application under section 6 of the Board of Trade Arbitrations Act, 1874, and under sections 5 and 7 of the schedule to the North Staffordshire Railway Company's Rates and Charges (No. 17) Order Confirmation Act, 1892.

The railway company claimed to be entitled to charge the Salt Union a reasonable sum by way of addition to the tonnage rate for services alleged by the railway company to be rendered by them to the Salt Union at their request, or for their convenience, at or in connection with sidings belonging to the Salt Union at Malkins Bank and Wheelock in Cheshire. The railway company also claimed to charge the Salt Union, by way of rent or otherwise, for structural accommodation alleged by the railway company to have been provided for the private use of the Salt Union, and not required by the railway company for dealing with the traffic for the purposes of conveyance—that is to say, the erection of signal cabins, signals, and other structural appliances for the private use of the Salt Union at Malkins Bank and Wheelock respectively, and the rendering of services to the Salt Union, including signalling at or in connection with sidings not belonging to the railway company, and the collection and delivery of the traffic of the Salt Union from and to such sidings which are outside the terminal stations of the railway company.

The Salt Union contended that as the structural accommodation used in connection with the Salt Union's traffic was not provided for their private use, and was required by the railway company for dealing with their passenger traffic and with traffic

1897, 1898. for the purposes of conveyance, the railway company were not entitled to make any charge for the same beyond the conveyance rate.

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The Salt Union further contended that at their sidings the railway company had not rendered any services at the request or for the convenience of the Salt Union, or any service which was not incidental to conveyance.

The nature of the accommodation provided and of the services rendered is fully stated in the judgment of Sir Frederick Peel.

Littler, Q.C., and *Ernest Moon*, appeared for the North Staffordshire railway company.

Balfour Browne, Q.C., *C. A. Cripps, Q.C.*, and *R. Whitehead*, appeared for the Salt Union.

SIR FREDERICK PEEL : The North Staffordshire railway company claim to be repaid certain expenses incurred by them in the period from 1st July, 1893, to 31st December, 1895, for works and services at the junction with their railway of sidings belonging to the Salt Union. The sidings are situate at Malkins Bank and Wheelock, and the railway is the company's Sandbach branch, which was opened as a goods and mineral line in 1852, and so continued till 1893, when it was resolved to prepare a portion of it for the conveyance of passengers. To fit it for this purpose it was necessary to have at all points improved junction and signal arrangements, and as regards the junctions at Malkins Bank and Wheelock to erect signals and signal cabins with telegraph instruments for the protection of the line and to control the junctions. The first question, then, we are asked to determine, is whether the railway company are entitled to be reimbursed by the siding owners the cost of the construction and maintenance of these works, it being alleged that the private sidings were the reason why the working of the main line had to be protected in this manner at those places. The application is made under the Companies Charges Act, 1892, section 7 of its schedule, which, indeed, appears to be the only provision in the Acts which we give effect to, under which,

except with consent of parties, it could be made. Now, the power of a person to lay down sidings to communicate with a railway is regulated by the Act of 1842, chapter 55, section 12, and by the Railways Clauses Act, 1845, section 76. The Act of 1842, when it applies, makes the exercise of his power subject to such conditions as the Board of Trade may direct, and the Act of 1845 renders him liable to pay the expenses of making the opening into the railway, and of constructing and from time to time renewing "the offset plates and switches." But if at the time a siding is laid down the railway is not a passenger railway, the Act of 1842, section 12, does not apply, and if afterwards it is proposed to make it one, the Board of Trade look to no one but the railway company to do all that is required to put their line into a fit state for the conveyance of passengers. Now, at the time the Salt Union made their junctions, and for long after, the Sandbach branch was only a goods and mineral line. The Act of 1842, therefore, did not apply in their case, but that of 1845 did, and it may be presumed they or their predecessors paid, as that Act directs, the cost of all works of which they were at the time the cause. But as to the works now in question, the occasion of them was that in 1893 the North Staffordshire desired to convert the Sandbach branch into a passenger line, and as one of the Board of Trade's requirements before they will allow a railway company to carry passengers is that home and distance signals shall be provided at junctions, the North Staffordshire had, of course, to provide such signals at, amongst other junctions, those at Malkins Bank and Wheelock. This expense, however, they incurred solely to satisfy the Board of Trade that the line might with safety be used as a passenger line, and to obtain the Board's sanction to their acting as carriers of passengers, and as what they did was to the benefit of themselves and of the public, and was not done with any view to facilitate siding traffic, it is, as it seems to me, upon them that the expense should fall. I think, also, that if it was not upon the railway company that it ought to fall, the question would occur whether these works do not belong to the railway, and if so, whether they are not charged for in the rate for conveyance, as part of

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that rate is for "the use of the railway." In any case, however, a trader is only liable under section 7 of the Charges Act, 1892, for such accommodation works as are there mentioned, that is to say, works "provided for his private use" and "not required by the company for dealing with the traffic for the purpose of conveyance," and as the works to which this application refers are of a more general character, they are not, I think, within the section.

The other expenses which the company claim to be repaid relate to the working of the signals and to shunting services at or in connection with the Salt Union sidings. But the reason for not allowing a charge to be made for the cost of providing the signals extends, I think, to the working of them, though if the Salt Union paid anything for signalling or signalmen before 1893 they should continue to do the same for the time since. As to the shunting services for which the railway company claim to be paid, according to the time their engine is engaged shunting, at the rate of 7s. per hour, the schedule to the Charges Act, section 5, sub-section 1, gives a railway company power to charge a reasonable sum by way of addition to the tonnage rate for "services rendered at or in connection with sidings not belonging to them," but the Salt Union deny that the shunting that is done for them at Malkins Bank or Wheelock is more than is incidental to conveyance. The traffic is salt and coal—salt outwards and coal inwards; and as the works at Malkins Bank are in three sets or separate parts, and there are several points at which they communicate by sidings with the railway, the business of delivering full coal trucks and collecting loaded salt vans and of bringing back and taking away empties is considerable. The Salt Union send a man to meet each train as it arrives, and he points out the particular sidings into which he desires trucks inwards to be put, or in which there are loaded salt vans to be hauled out. The railway company calculate that the time their goods trains are detained while the train engine is occupied in uncoupling trucks intended for delivery at the junctions and in picking up trucks ready to go in the direction in which the train is travelling averages per diem at Wheelock one hour, and at Malkins Bank one hour and

some minutes. It is difficult, not knowing the average number of trains calling daily, to say whether this is no more time than is required for the collection and delivery for which provision is made in the conveyance rate, but I think it would be taking a right course to fix what may seem a reasonable time per train for this purpose, and when there is more shunting than can be completed within this time limit to allow the railway company to charge for the extra engine time at the rate of 7s. an hour. I would fix the time for each train which arrives or departs with Salt Union traffic at 6 minutes for the Wheelock Works and 12 minutes for the Malkins Bank. The railway company maintain a small staff at Malkins Bank to look after the siding traffic and to superintend the working of it to and from the main line. The traffic is partly Salt Union and partly Brunner, Mond and Company, and the railway claim that the expense, which is about £100 a year, should be borne by the two firms in the proportion of the tonnage dealt with. The service the staff perform seems to be a necessary one, and of a sort for which when done at a station a charge in addition to the conveyance rate is allowed. I think, therefore, the railway company's claim, as it respects the Salt Union, may be allowed.

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LORD COBHAM: I concur in the decision pronounced in this case, with the explanation to be added by the learned judge, which satisfies some doubts that I entertained with regard to the allowance we make the railway company for the shunting services they perform for the Salt Union at Malkins Bank and Wheelock.

WRIGHT, J.: I also agree with the judgment which has been delivered, and I have only to add a statement of the law as we understand it and have applied it with reference to the railway company's claim to make an extra charge for services on their own line in the delivery and collection of traffic at the traders' sidings.

It is not implied in our judgment that the railway company can charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or

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collection of traffic to or from sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect. The very existence of the siding implies in practice that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit. But they may be entitled to make a carrier's or service charge if they are required, for the convenience of the siding owner, to do work on his siding; and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge. For instance, a siding may, from its limited size or its situation, be such as not of itself to afford sufficient accommodation for the delivery or collection of its traffic. In such a case, if for the convenience of the trader the company work in and out of the siding, and if in order to do so they are obliged to make an extraordinary use of their own lines, it may be that their lines would be regarded for this purpose as a prolongation of the sidings, and the company may, according to the circumstances, be entitled to that extent to be paid for the extraordinary work done on their own lines, as if their lines were a part of the sidings themselves.

[Solicitors for the North Staffordshire Ry. Co.: *Burchell & Co.*

Solicitors for the Salt Union: *Neish, Howell and Macfarlane.*]

COWAN & SONS, LIMITED,

v.

NORTH BRITISH RAILWAY COMPANY.

NORTH BRITISH RAILWAY COMPANY

v.

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Services rendered at or in connection with sidings not belonging to a Railway Company—Reasonable Charge for Haulage—Sheeting—Marshalling—Time occupied by engine in shunting operations at siding—Railway Rates and Charges (No. 25) Order Confirmation Act, 1892—Rebate on sidings rate—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.

The railway company claimed to be entitled under section 5 of the schedule to their Railway Rates and Charges (No. 25) Order Confirmation Act, 1892, to charge Messrs. Cowan a reasonable sum by way of addition to the tonnage rate for conveyance for services rendered by them to Messrs. Cowan at their request or for their convenience at or in connection with Messrs. Cowan's Low Mill siding at Penicuik, and at or in connection with sidings not belonging to the railway company at Granton harbour and Leith harbour, but running into and connecting with their Granton station and their Leith goods station.

Messrs. Cowan sent esparto grass in bales from Granton harbour and Leith harbour to their mills at Penicuik, connected by private sidings with the company's railway, the Low Mill siding where the esparto was delivered being about sixteen miles from the Leith and Granton stations. The rate charged was 5s. a ton, and the maximum charge for conveyance for that distance being 3s. 1d., the balance of the rate, viz: 1s. 11d., was the charge for services other than conveyance. These services were (1) haulage over the harbour lines; (2) use of Granton or Leith Docks station; and (3) services at the Low Mill siding.

(1) As to the first of these services it was proved that when a vessel arrived at the docks the esparto was loaded direct from it into the railway trucks by men employed and paid by the consignees, but the sheeting of the trucks was done by the railway company, and also the haulage of them by engine and horse-

October 20,
21, 1897,
January 26,
1898.

(1) Before Lord TRAYNER, and Commissioners Sir FREDERICK PEEL and Viscount CORHAM, sitting at the Parliament House, Edinburgh.

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power over the harbour lines to their goods stations at Granton and Leith. The charge for this service was 6d. a ton. In this charge was included 1½d. per ton for the sheeting, being the full service terminal, and 1d. per ton for the supply of straw and the laying it in trucks to prevent injury to the esparto from dust and damp. The railway company alleged that as there was no obligation on a railway company to perform services outside its own line, the haulage they did on the harbour lines, which were not theirs, was not a service within section 5 of their Rates and Charges Act, 1892, and that they might charge what they pleased for doing it.

Held, that such service was within section 5, such haulage being not more either of an outside or a voluntary service than cartage or collection and delivery; and the haulage being a service at or in connection with a siding, it did not affect the question that the railway company might decline to perform it if they considered it unremunerative at the price fixed.

Held, further, that 6d. per ton was a reasonable sum to be charged by the railway company to Messrs. Cowan for the haulage of trucks over the harbour sidings at Granton and Leith harbours to the railway company's goods stations at Granton and Leith, and the sheeting of such trucks, and the supply and laying of straw in such trucks in respect of esparto traffic to their sidings at Penicuik.

(2) As to the second of these services, it was proved that after the trucks had been loaded and brought into the Granton or Leith station they had, before being sent away, to be made up into a train with other trucks, and the marshalling of them for that purpose constituted the entire service rendered within the station in connection with the harbour lines. For such work the company claimed to charge 13½d. a ton, or three-fourths of their maximum station terminal.

Held, that marshalling after loading and before conveyance was one of the duties for which provision was made in the station terminal, and that some proportion of that terminal would be the payment for it. And that a sum not exceeding 9d. per ton would be a reasonable sum to be charged by the railway company to Messrs. Cowan for what was done by them in dealing with Messrs. Cowan's traffic at the company's goods stations at Granton or Leith.

(3) As to the third of these services being a service performed by the railway company in respect of the delivery of Messrs. Cowan's traffic to their Low Mill siding, the junction with which was within a quarter of a mile of the Penicuik station, it was proved that esparto or other traffic arrived at this siding daily by one or more trains, and that the average number of trucks left per train was about seven; and that the goods engine drew up as it approached the junction, and its engine put into the siding the trucks that were destined for it; and in addition to putting them clear of the main line, it put them into whichever set of rails near the points it was convenient to Messrs. Cowan to have them. A note was then taken of the number and contents of each truck by a checker employed by the railway company. For esparto thus delivered the railway company's charge was 3½d. per ton, and this they contended was not more than the cost of the extra time their engine and men were employed, distributed over the tonnage carried, came to per ton. This extra time they reckoned at fifteen minutes per train, but it was proved that the actual length of the stops did not average four minutes, leaving eleven minutes for time lost or reduced speed before and after stopping.

Held, that a railway company were not entitled to make a special charge for time occupied in the stopping and again starting of a train, for it was part of the service of delivery, which was provided for in the rate for conveyance; nor

on the same ground could they make a special charge for so much of the actual time the train was at a standstill as it took to uncouple and put trucks past the points.

Held, further, that if the time a train was detained at Low Mill siding (while its engine was occupied in shunting Messrs. Cowan's traffic) exceeded four minutes, that the railway company would be entitled to charge Messrs. Cowan for time over the said four minutes during which the railway company's engine was occupied in shunting such traffic at the rate of 7s. an hour.

THE first of these applications was under section 4 of the Railway and Canal Traffic Act, 1894, for an order to determine what was a reasonable and just allowance or rebate to be made by the North British railway company to Messrs. A. Cowan and Sons, in respect that the railway company did not provide station accommodation, or perform terminal services for the traffic of Messrs. Cowan.

Messrs. Cowan carried on business as manufacturers of paper at Penicuik. They were proprietors of three mills at Penicuik, namely, Low Mill, Valleyfield Mill and Bank Mill, connected with the railway of the North British railway company by means of sidings not belonging to the railway company. A dispute arose between Messrs. Cowan and the railway company as to the allowance or rebate to be made from the rates charged to Messrs. Cowan by the railway company for the carriage of esparto in bales from Granton and Leith harbour to Low Mill sidings, and for the carriage of paper from the mills at Penicuik to places on and beyond the North British railway company's line, in respect that the railway company did not provide station accommodation or perform terminal services for Messrs. Cowan at Penicuik, for such paper traffic. It was proved at the hearing that there were no station or service terminals included in the rates complained of by Messrs. Cowan.

The second application was a claim by the North British railway company under section 5 of the schedule to their Railway Rates and Charges (No. 25) Order Confirmation Act, 1892, to charge Messrs. Cowan a reasonable sum, by way of addition to the tonnage rate for conveyance, for services alleged by the railway company to be rendered by them to Messrs. Cowan, at their request, or for their convenience, at their Low Mill siding, and at sidings not belonging to the railway com-

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 COWAN & SONS and connecting with their Granton goods station and their
 LIMITED Leith goods station.

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The nature of the services rendered, and the amounts claimed
 in respect of them, are fully stated in the judgment of the
 Court, which was delivered by Sir Frederick Peel.

COWAN & SONS
 LIMITED.

*Dean of Faculty (Asher, Q.C.), the Solicitor-General (Dickson,
 Q.C.), Balfour, Q.C. (Grierson with them), for the North
 British railway company:*

The 5s. rate charged to Messrs. Cowan is a voluntary rate,
 including services rendered by the railway company outside
 their own premises, which they are not bound to render, and
 therefore it is not a rate which the Commissioners have juris-
 diction to interfere with. *Watson, Todd & Co. v. Midland Ry.
 Co. and London & North-Western Ry. Co.* (1).

That case is also an authority that no relief can be granted
 under section 4 of the Act of 1894, except where the trader is
 in the position of really being at a terminal station, and being
 at a terminal station, in a position to dispense with certain
 services which the railway company are ready to offer him
 there, but which he does not require.

In the present case the trader is not near a terminal station,
 but has a siding on the line.

The rate from which the abatement is asked is a rate
 including nothing for terminal accommodation or service.

Ure, Q.C. (Clyde with him), for Messrs. Cowan:

The Court have jurisdiction, under section 4 of the Railway
 and Canal Traffic Act, 1894, the traffic being received at a
 siding which does not belong to the railway company, to wit,
 the Duke of Buccleuch's branch railway, or siding, at Granton
 Pier, and being delivered at Messrs. Cowan's own private siding
 at Penicuik.

The Court have also jurisdiction, under section 5 of the

(1) *Ante*, Vol. IX. 90.

Charges Order Act, 1892, with regard to the services performed at Granton harbour, because they are "services for which they are entitled to receive a reasonable sum by way of addition to the tonnage rate," and also because they are "services rendered by the company at or in connection with sidings not belonging to the company." At the Penicuik end of the transit the railway company perform no services except such as are incidental to conveyance. *Lancashire & Yorkshire Ry. Co. v. Gidlow* ⁽¹⁾; *Dunkirk Colliery Case* ⁽²⁾; *Manchester, Sheffield & Lincolnshire Ry. Co. v. Pidcock* ⁽³⁾.

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This is the first time a railway company have sought to make a charge for the time occupied in stopping to put trucks into a siding as an extra service rendered.

As to the railway company's contention that no rebate can be granted from the rate charged for Messrs. Cowan's outward traffic, on the ground that it is a group rate—it is sufficient to say that a group rate is exactly the same as any other rate, except in the matter of distance, and the granting of undue preference.

SIR FREDERICK PEEL: This is a complaint as to certain paper and esparto rates of the North British company. Messrs. Cowan send esparto grass in bales from Granton Pier and Leith Docks to their mills at Penicuik station, and the rate is 5s. a ton. The rate before 1886 was 5s. 4d., but in that year Messrs. Cowan and other papermakers on the Esk applied to the railway company to reduce the rates, and a reduction to 5s. was agreed to. The company reserved, however, the right to alter it again at any time as they might think necessary, and the senders and receivers of the goods had of course a corresponding right of terminating the arrangement. Messrs. Cowan have availed themselves of this right, and the rate, as arranged or agreed in 1886, being at an end as regards their traffic, they ask that the rate substituted for it may be regulated by the company's Rates and Charges Act, 1892, and section 4 of the Railway Traffic

⁽¹⁾ L. R. 7 H. L. 517.

⁽²⁾ *Ante*, Vol. II. 402.

⁽³⁾ *Ante*, p. 150.

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Act, 1894. Their mills at Penicuik connect by private sidings with the company's railway, and their Low Mill siding, where the esparto is delivered, is about 16 miles from the Leith and Granton stations. The average distance is 16 miles, 32 chains, and the maximum charge for conveyance for that distance being 3s. 1d., the balance of the rate, viz. 1s. 11d., is the charge for services other than conveyance. No station terminal is due at either end, as the traffic passes both to and from sidings "not belonging to the company," and it does not appear that there is any station or other terminal included in the rate, in respect of which Messrs. Cowan have a claim to a rebate under section 4 of the 1894 Act. The ground on which the respondents justify a present 5s. rate on the applicants' esparto traffic, as to the 1s. 11d. portion of it, is that section 5, sub-section 1, of their Rates and Charges Act, 1892, gives them power to charge a reasonable sum by way of addition to the tonnage rate for services rendered at or in connection with sidings not belonging to them. The charge which they make, and the reasonableness of which Messrs. Cowan dispute, is 1s. 11d. a ton, and the services other than conveyance which are rendered are described as being (1) haulage over the harbour lines; (2) use of Granton or Leith Docks station; and (3) services at the Low Mill siding. The company allege at the same time, that considering there is no obligation on a railway company to perform services outside its own line, the haulage they do on the harbour lines, which are not theirs, is not within the section 5, and that they may charge what they please for doing it. But it is not more either of an outside or a voluntary service than cartage, or collection and delivery, which is nevertheless amongst the services for which, if performed, what a company may charge, if a difference arises, is the sum an arbitrator may fix under this section, and similarly if the haulage is in other respects, and it is not denied that it is, a service at or in connection with a siding, it does not affect the question that the company may decline to perform it, if they consider it unremunerative at the price fixed. We think, therefore, the services under all three heads are within section 5, and as to the course provided by that section for determining differences arising

under it, we have been appointed by the Board of Trade to determine the present difference.

When a vessel arrives at the docks, the esparto is loaded direct from it into the railway trucks by men employed and paid by the consignees, but the sheeting of the trucks is done by the railway company, and also the haulage of them to and from their own premises. The company's charge for this service is 6*d.* a ton, and to show that this is a moderate charge, they submit a statement of the cost to themselves at which the cargo of a vessel, which brought 514 tons for Messrs. Cowan last February, was despatched from the ship's side to Granton station. The number of trucks used was 143, and the cost worked out at per ton for engine and horse haulage, men's time in wages, sheeting and straw for the trucks, came to 6.12*d.* For the sheeting or covering they charge, as they have power to do, their full service terminal of 1½*d.* per ton, and, deducting this, 4½*d.* for the other work does not seem to us unreasonable. Special objection was taken to 1*d.* per ton being charged for the straw, which is put into the trucks, by desire, it is said, of the papermakers, to prevent injury to the esparto from dust and damp, but as 3½ tons of esparto make a truck load, and the company lay the straw as well as supply it, a charge at the rate of 3½*d.* a truck may stand.

After the trucks have been loaded and brought into the Granton or Leith station they have, before being sent away, to be made up into a train with other trucks, and the marshalling of them for this purpose constitutes the entire service rendered within the station in connection with the harbour lines. For this work the company claim to charge 13½*d.* a ton, or three-fourths of their maximum station terminal. Marshalling after loading and before conveyance may be regarded as one of the duties for which provision is made in the station terminal, and some proportion of that terminal would be the payment for it. But the terminal is given mainly by way of remuneration for the accommodation a station affords in receiving and loading goods; and the load once on the trucks, what remains to be done with it before departure is not the larger part of station business. Here the trucks are loaded off the company's system,

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but like trucks that are loaded in the station, they are there made up into trains, and for this such a sum as might be set apart for similar work out of a station terminal would, in the state of things under which this traffic has to be worked, make a reasonable charge. This sum would not, in our opinion, exceed 9*d.* a ton. *Pidcock's Case* ⁽¹⁾ was referred to in support of the claim to charge as much as 13½*d.* a ton, but the circumstances of that case were different and peculiar, the private siding there being laid on land which was part of the company's goods yard, and the company incurring the same expense in depositing trucks in that siding as in their own sidings, which were alongside of it. Messrs. Pidcock were entitled to some allowance for relieving the company from finding standing room for their trucks while unloading, but subject to this, a charge of the amount of the terminal was not under the circumstances unreasonable. There cannot be any fixed proportion, and in another recent case ⁽²⁾ in England, one-fourth only of the station terminal was granted.

There is lastly the service at the Low Mill siding, the junction with which is within a quarter of a mile of the Penicuik station. Esparto or other traffic arrives at this siding daily by one or more trains, and the average number of trucks left per train is about 7. The goods train draws up as it approaches the junction, and its engine puts into the siding the trucks that are destined for it, and in addition to putting them clear of the main line, it puts them into whichever set of rails near the points it is convenient to Messrs. Cowan to have them. A note is then taken of the number and contents of each truck by a checker employed by the company. For esparto thus delivered the company's charge is 3½*d.* a ton, and this they consider is not more than the cost of the extra time their engine and men are employed, distributed over the tonnage carried, comes to per ton. This extra time they reckon at 15 minutes per train, but as the actual length of the stops does not average 4 minutes, an allowance of 11 minutes for time lost on reduced speed before and after stopping seems too much. No special charge, how-

⁽¹⁾ *Ante*, p. 150.

⁽²⁾ *Evans v. Midland Ry. Co.*, not reported.

ever, can be made for time occupied in the stopping and again starting of a train, for it is part of the service of delivery, which is provided for in the rate for conveyance, and the same must be said of so much of the actual time the train is at a standstill as it takes to uncouple and put trucks past the points. Four minutes, it appears, suffice for that, and it is only therefore when the engine is detained on the siding work for a longer time that there is ground for an extra charge. When that is the case a charge, we think, may be made for any time a train waits more than four minutes while its engine is at work, at the rate of 7s. an hour.

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The other part of Messrs. Cowan's application is a claim under the Traffic Act of 1894, section 4, for rebates off the rates for paper going out from Penicuik to various places, on the ground that the rates include charges for services and station accommodation at the Penicuik end which their traffic does not use or require. The rates to Manchester (26s. 8d. per ton C. and D.), to Newcastle (20s. also C. and D.), and to London (30s. S. to S.) are specially mentioned, and these rates are stated in the company's answer, and again in their cross application, to be equally applicable to traffic from stations and from private sidings at or near a station, and whether the railway company collect the traffic or not. Upon that state of things Messrs. Cowan, for whom the company do not cart, load, cover, or provide station accommodation at Penicuik, would certainly be entitled to have allowed them as rebates such sums as are charged for cartage, &c., in the paper rates. It was stated, however, at the hearing that the rates are not correctly described in the pleadings, and that they do not as a fact include any sums for cartage, &c., at the Scotch end of the route, for that the papermakers, with whom the rates were arranged many years ago, were all then, and still are, in the position Messrs. Cowan are in, of not requiring the company's terminal services at the Scotch end, and that the North British have never performed such services for any of them. Viewing the case as to these rates as altered by Mr. Conacher's evidence, we cannot, we think, interfere with them under section 4 of the Traffic Act, 1894.

1897, 1898. Messrs. Cowan gave notice of appeal against so much of the
COWAN & SONS decision of the Commissioners as determined that they were not
LIMITED entitled to a rebate or allowance off the rates charged to them
v. by the railway company, but subsequently abandoned such
NORTH appeal.
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RY. Co.
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COWAN & SONS [Solicitors for the applicants: *Menzies, Black and Menzies,*
LIMITED. Edinburgh.]

Sir F. Peel. Solicitor for the railway company: *J. Watson, Edinburgh.*]

SALT UNION, LIMITED,

v.

NORTH STAFFORDSHIRE RAILWAY COMPANY (No. 1) ⁽¹⁾.

*Rebate on Siding Rates—Onus of Proof—Evidence of Comparable Rates—
Station Accommodation—Railway and Canal Traffic Act, 1894 (57 & 58
Vict. c. 54), s. 4.*

Section 4 of the Railway and Canal Traffic Act, 1894, enacts:—

“Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.”

*December 16,
17, 1897,
July 12, 1898.*

The applicants claimed under this section to be entitled to a rebate on the rates charged to them by the railway company, on the ground that the railway company provided no station accommodation for the applicants' traffic. The applicants consigned salt from their private sidings for carriage over the respondents' railway, and it was admitted that the railway company did not provide any station accommodation or perform any terminal services. The railway company denied that the rates charged included a station terminal at the initial end. The applicants contended that a presumption was raised that they were charged an initial station terminal by showing—

- (1) that several of the through rates were above the maximum, unless they included two terminals;
- (2) that the rates from the nearest station, which was within one mile of the applicants' sidings, for class B. articles (among which salt would be classed) were lower than the special salt rates from the sidings, although the former were station-to-station rates and at the railway company's risk, the latter being at the applicants' own risk.

It was admitted that no salt was in fact sent from the station, but only from the applicants' sidings.

Held, that there was no legal evidence that a second terminal was included in the special salt rates charged to the applicants, and that, where the rate was not above the maximum allowed for conveyance *plus* one terminal, the Court would

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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not assume (in the absence of express evidence or admission) that an illegal and second terminal had been included in that rate.

Held, further, that express evidence ought to be given to show that the terminal was included, when the Court was asked to act on the view that it was so included.

Quere, whether a trader is not entitled to a rebate under the 4th section of the Railway and Canal Traffic Act, 1894, without reference to the question whether the second terminal is in fact included in a rate, although the rate may be within the maximum, where a comparable rate can be shown with reference to which the question can be raised.

Held (by the Court of Appeal), that an applicant under section 4 of the Railway and Canal Traffic Act, 1894, must make out a *prima facie* case in support of the application, and that the applicants, by merely proving that they were charged the rates, and that the siding did not belong to the railway company, had not made out a *prima facie* case that the rates included a charge for station accommodation so as to place upon the railway company the onus of proving that the rates did not include a charge for station accommodation.

Per A. L. SMITH, L.J.: The applicant must show that the rates charged to him include a charge for station accommodation or terminal services at the siding.

Per RUGBY, L.J., and VAUGHAN WILLIAMS, L.J.: The applicant may prove his claim to a rebate independently of whether he is charged for station accommodation or terminal services or not.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894.

The applicants consigned salt from their sidings at Wheelock and Malkin's Bank in Cheshire for carriage over the respondents' railway, and it was admitted that the applicants at the initial terminus did not make use of any accommodation at a terminal station, nor did the railway company perform any duties at a terminal station.

The applicants claimed to be entitled to a rebate from all rates upon such salt traffic charged to them by the railway company, in respect that such company did not provide station accommodation for their said traffic.

A dispute having arisen, the applicants applied to the Railway Commissioners to decide what allowances or rebates were reasonable and just. The respondents contended in their answer that the rates charged were, and were expressed to be, applicable from private sidings only, and stated that they did not include any station or service terminal, or any other charge whatever, in respect of the initial terminus. The respondents also supplied a table to the applicants (which the applicants put in) giving an

analysis of the rates charged, and not showing upon its face a charge for station accommodation at the sidings in question. 1897, 1898.

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*Balfour Browne, Q.C., C. A. Cripps, Q.C. (R. Whitehead with them), for the applicants:—*In 1872 the salt rates were all quoted from Ettiley Heath (the goods station nearest the sidings). The class B. rates (in which class is salt) from that station are now in 120 cases higher than the salt rates, though they are station-to-station rates and cover insurance. In fifty cases the same rate is charged as in 1872. Where a special rate, which ought to be lower, is absolutely higher than a class B. rate, it is a fair inference to say that it contains the same charge as the class B., viz. the station charge. As regards the through salt rates, in certain cases, unless the two terminals are included, the company are exceeding their maximum. The comparison with the class B. rates at Ettiley Heath (the nearest point which can be taken) is the only possible evidence in this case.

Where the railway company do not provide station accommodation they cannot charge for it, and section 10 of the Railway and Canal Traffic Act, 1888, gives jurisdiction to the Commissioners to deal with such a charge as an "illegal charge."

Section 4 of the Railway and Canal Traffic Act, 1894, is a direct declaration that a trader is entitled to a rebate where station accommodation is not provided, and this refers to the future, whereas section 10 probably refers only to past charges.

A rate not exceeding the maximum for conveyance, and yet having a terminal element in it, would not be an illegal charge under section 10 of the Act of 1888, but the trader would be entitled to a rebate from it under section 4 of the Act of 1894.

WRIGHT, J.: We can give a rebate under section 10 of the Act of 1888 against so much of the rates or charges as are above the maximum. In order to go further, you must rely on section 4 of the Act of 1894. In order that we may be able to act on that to the extent of the 6*d.* which you are asking, you must find us some comparable traffic; that is to say, you must make a case to show that in other instances where there are two terminal stations the same total rate or charge is demanded as in

1897, 1898. this case. That would be a *prima facie* case for relief to the extent of the station terminals.

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Littler, Q.C. (Ernest Moon with him), for the railway company:—The applicants do not deal in class B. articles; it does not matter to them if the railway company choose to carry these articles for nothing. In the case of a rate to a station off the respondents' railway, if the total rate charged by all the companies is within the maximum, the applicants cannot complain of any one of the companies; if the total rate is complained of, the other companies must be present. [WRIGHT, J.: The other companies may have to be here.] In *Corporation of Birmingham and Others v. Midland Ry. Co.* ⁽¹⁾ Collins, J., says that the absolute onus of proof is on the applicants. In the *New Union Mill Co. v. Great Western Ry. Co.* ⁽²⁾ it is not decided whether the Act of 1894 has altered the law as to the obligation imposed by sub-section 3 of section 33 of the Railway and Canal Traffic Act, 1888, which compels railway companies to dissect their charges. The Courts should not infer, when two railway companies can legally charge what they are charging, that the through rate includes a charge which they cannot legally include.

At the conclusion of the applicants' case it was submitted on behalf of the railway company that there was no evidence in support of the application.

WRIGHT, J.: The question which Mr. Littler has raised is, I suppose, a question primarily for the legal member of the Court to decide, but I think I may say that there is no dissent on the part of any member of the Court in what I am going to say; if there is, it will be expressed.

Speaking for myself, I regret extremely to give effect to Mr. Littler's contention on this part of the case, for I think it highly desirable that matters of this kind should be gone into on both sides, and that the Court should have all the evidence it can have; but at the same time I think that if there is no legal

⁽¹⁾ *Ante*, Vol. IX. 165.

⁽²⁾ *Ante*, Vol. IX. 152.

evidence to support the particular contention of the trader, we are bound to give the railway company the benefit of our views, right or wrong, upon that point. I have come to the conclusion that there is no legal evidence that ought to be left to the tribunal, including myself, that a second terminal is included for the present, I will say, in some or in most of these charges. It is not pretended here that these rates have been built up deliberately by putting together so much for conveyance, so much for one station terminal, and so much for another station terminal. That is not contended, or, if it is contended, there is not a trace of evidence of it. What is said is, that it ought to be presumed or inferred from the facts of the case, otherwise the rate cannot be justified. Now this, to my mind, is the important thing. In a certain proportion of the instances, and I believe in most instances, the rate charge is not in excess of the maximum when added to the one terminal. That is certainly so as regards some of them; and for the purposes of my observation now, it is enough to say as regards some of them, because where the rate charged is not in excess of the maximum in that sense, it is impossible to impute, without express evidence, to the railway company that they have included in a lawful rate an illegal and second terminal. It is quite contrary to the principles of justice to impute that to them without express evidence, or an admission on their part. If you cannot impute that in a case in which the rate is within the maximum, why should you impute the same illegality in the other case? That would be contrary to principle. I think the cases which have been cited show that there is no presumption that the second terminal is included in a case like this. The view of the Court has been that express evidence ought to be given to show that it is included where the Court is asked to act on the view that it is included. Therefore I come to the conclusion that there is no real evidence that the second terminal is included; but I wish, in saying that, very emphatically to reserve to the Court the right and the power of inquiring, under the fourth section of the Act of 1894, whether a trader is not entitled to a rebate without reference to the question whether the second terminal is in fact included in a rate, although the rate may be within

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1897, 1898. the maximum, where a comparable rate can be shown with
 SALT UNION, reference to which the question can be raised. That is a point
 LIMITED, which, I think, was reserved to the Court by my predecessor,
 v. Collins, L.J., in the case of the *New Union Mill Company v.*
 NORTH *Great Western Ry. Co.* ⁽¹⁾; and I wish to reserve it for
 STAFFORD- consideration when the question arises. I should have thought
 SHIRE RY. Co. that this case ought not to have been stopped at all upon the
 (No. 1). point upon which it is being stopped, if there had been any
 — evidence of a comparable rate here; but it is admitted (there is
 Wright, J. no evidence to the contrary forthcoming) that no traffic is sent
 — from station to station, it is all from siding to station, and
 class B. rates and other articles are not here to compare with it.
 Therefore it is not open to us upon this application, I think, or
 at any rate it is not desirable for us upon this application,
 without further evidence than we have, to determine the question
 whether section 4 of the Act of 1894 would be applicable in a
 case where the rate is within the maximum, unless there is some
 comparable rate to test the matter by. Of course this does not
 in any way preclude the applicants as regards instances in which
 the rate is above the maximum. We have already indicated
 that we can deal with that under section 10 of the Act of 1888,
 although, in my judgment, not under section 4 of the Act of
 1894. Therefore the case must proceed, if necessary, as to any
 instances in which the rate is beyond the maximum.

SIR FREDERICK PEEL: This is a claim upon the North
 Staffordshire railway company for a rebate or allowance from
 their salt rates in respect that the applicants receive no station
 accommodation. The claim is made under section 4 of the Act
 of 1894 and section 10 of the Act of 1888. The railway com-
 pany admit that no station terminal at the forwarding end can
 be charged in salt rates from the private sidings at Malkin's
 Bank and Wheelock, but they deny that any has been charged.
 The Salt Union, in support of their claim, put in a list of salt
 rates which are, they say, when deduction is made for the com-
 pany not providing trucks, more than the maximum conveyance

(¹) *Ante*, Vol. IX. 152.

rate added to one full terminal. Many of these rates are to stations off the North Staffordshire line, and cannot be considered in the absence of the other companies interested in them; but there are several to North Staffordshire stations, and, assuming the distances and rates to be correctly given, the actual rates seem in some cases to exceed the company's maximum powers, and as to these the applicants are entitled to an order to have the rates reduced by the sums in excess, and to be reimbursed sums overcharged in the past. The applicants further contended that these sums in excess were due to the charging a terminal at the loading end, and that it might be supposed, therefore, that even rates in which there was no excess were similarly made up. We thought, as Mr. Justice Wright has said, that this ground for assuming a terminal to be charged would not warrant us in coming to that conclusion, and I think the same of the other ground put forward by the Salt Union for their supposition, namely, that the class rates for articles with which salt is classed, from a place only one mile from Malkin's Bank, Ettiley Heath station, were lower than the salt rates from the sidings, and that as the rates from Ettiley Heath station were station-to-station rates, so also must the private siding rates be; for even if it is a fact that they were lower, it appeared that no salt is sent from Ettiley Heath nor any article with which salt competes. The claim, therefore, for a rebate off rates, as regards rates not above the maximum, fails.

The Salt Union, Limited, appealed from this decision.

C. A. Cripps, Q.C. (R. Whitehead with him).

Section 4 of the Railway and Canal Traffic Act, 1894, says the rebate is to be given "in respect that the railway company do not provide station accommodation or perform terminal services"—and that is all the applicants need prove, the section not being "in respect that the railway company have charged for station accommodation or terminal services." Otherwise the section will be rendered useless to the trader, since the railway company alone know whether they have charged for station accommodation or terminal services.

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In *Pidcock v. Manchester, Sheffield and Lincolnshire Ry. Co.* ⁽¹⁾, Collins, J., gave the true construction of the words "in respect that" when he said that the section intended to give a rebate "in respect that," that is, in proportion as or to the extent that, the company do not provide station accommodation or perform terminal services." A comparable rate is only one way of making out a *prima facie* case, not the only way. Upon proof that the sidings did not belong to the company, and that the company charged rates, a *prima facie* case was made out, calling for an answer from the railway company.

Littler, Q.C. (*Ernest Moon* with him), for the railway company.

The onus lies on the applicants to make out a *prima facie* case that the rates include a charge for station accommodation; this may be done by direct evidence, or by such evidence as would raise a presumptive case that the charge is included, *e. g.*, by means of a comparable rate. No such evidence was given here, and therefore the applicants made out no case calling for an answer from the railway company.

A. L. SMITH, L.J.: I am of opinion that this appeal should be dismissed, and with that opinion my learned brothers concur. This is an application by the Salt Union, Limited, a trading company, to the Railway Commissioners, under section 4 of the Railway and Canal Traffic Act, 1894, asking them to grant an allowance or rebate from the rates charged to the applicants for salt sent from the applicants' own sidings over the railway company's lines, upon the ground that the railway company have in the rates charged them for station accommodation and terminal services which the company do not provide or render.

The contention put forward on behalf of the applicants is this: that upon the true construction of section 4 of the Railway and Canal Traffic Act, 1894, when they have proved that they own the sidings from which the traffic is despatched, and that they do not, therefore, require or have station accommodation

(1) *Ante*, Vol. IX. 45.

or terminal services from the railway company, and that they have been charged a rate for the traffic consigned from their sidings for carriage over the railway, they have made out a *prima facie* case, and that it is not necessary for them to go on and prove that the rate charged includes a charge for station accommodation or terminal services; but that it then lies upon the railway company to prove a negative—namely, that they have not charged the applicants for station accommodation or terminal services. That is the argument advanced on behalf of the applicants. Now it appears to me a strange proposition that a railway company who are in the position of defendants should be called upon to prove a negative when no affirmative case has been made out against them. The applicants claim an allowance or rebate. An allowance or rebate, in my opinion, implies that the trader has been charged for that in respect of which the allowance or rebate is claimed. The ground of the claim is that the trader has been charged by the railway company for station accommodation or terminal services which the company had no right to charge for, because the trader had his own station accommodation. I do not think that the construction which the applicants contend for is the true construction of the section. In my opinion, the meaning of the section is that if a trader makes out by any evidence, whether by means of a comparable rate, as in the case of *Corporation of Birmingham v. Midland Ry. Co.* ⁽¹⁾, or by any other means, a *prima facie* or presumptive case that he has been wrongly charged for station accommodation or terminal services, then the Railway Commissioners should say that a case has been made out which the railway company are called upon to answer, and that the company must then show that they have not made the charge of which *prima facie* evidence has been given. But I cannot see how an applicant under this section, by merely proving that he has been charged a rate, and that he has not had station accommodation provided for him or terminal services rendered to him by the railway company, without at the same time giving some evidence that he has been charged more than he ought to have

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been, can call upon the company to produce their evidence and answer a case which is only in the air, and has not been made out, even by presumptive evidence, against them. I cannot accept the view of the section put forward on behalf of the applicants.

In arriving at this construction of the section, I have the authority of my brother Collins in the case of the *Corporation of Birmingham v. Midland Ry. Co.* (¹). In that case the Corporation of Birmingham had coal consigned to them, and that coal was delivered by the railway company partly at the corporation's private siding at Saltley and partly at the railway company's siding at Lawley Street. In the one case, therefore, the corporation had the use of the company's siding, and in the other case they had not, but they were charged the same rate to both sidings. There, Collins, J., said: "They" (that is, the corporation) "say that a charge is made in the rate to them to Saltley siding for station accommodation and terminal services, and inasmuch as the Saltley siding is not a station, so much of the charge embraced in the rate as is applicable to terminal services and station accommodation must be struck off: that is the contention. They are the applicants, and to make good that contention it seems to me they must satisfy this tribunal to begin with that they have been called upon to pay a charge which they ought not to pay by reason of the fact that they have not received the accommodation or had the benefit of the services in respect of which that charge is made. . . . It seems to me, unless they make good that position, they have not established their *prima facie* right to a rebate on proof that Saltley is not a terminal station." That is exactly the view of the section which I have been trying to express—namely, that to bring themselves within this section the applicants must give some presumptive evidence that they have been called upon to pay a charge which they ought not to be called upon to pay by reason of their not having received station accommodation or had the benefit of terminal services.

The question which arose in the present case was whether

(¹) *Ante*, Vol. IX., at p. 169.

the applicants at the end of their evidence had made any case of a right to a rebate. An applicant is entitled to bring his case before the Railway Commissioners, that I do not doubt; but, having given all the evidence he can, the question then arises whether he has brought his case within the section by giving some evidence that in the rate which he has been charged something has been included for station accommodation or terminal services which he has not had. As my brother Collins says in another part of his judgment ⁽¹⁾, "the onus is on the applicants on every part of the case, and they must make out their case in order to entitle themselves to the rebate." Upon these grounds I am of opinion that the appeal should be dismissed.

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RIGBY, L.J.: The question before us turns upon the construction of section 4 of the Railway and Canal Traffic Act, 1894. I am unable to read the section as if the words "in respect that the railway company does not provide station accommodation or perform terminal services" were not there, and that in place thereof there were the words "in respect that the railway company has charged for station accommodation or terminal services." If that had been intended, it would have been easy for the Legislature to have said so. Having regard to the language used in the section, it appears to me to be open to an applicant who brings himself within the section to prove his claim to an allowance or rebate in any way he can, and I am far from saying—though I do not decide it—that he might not prove his claim to an allowance or rebate without proof that the railway company had in fact charged him for station accommodation or terminal services. I see no reason why he should not do so. At the same time I do not hesitate to say that such an application, when it comes before the Railway Commissioners, must be treated in the same way as all other cases—that is to say, that the applicant has to make out a *prima facie* case in support of his application, and he can do that in any way he pleases. The way in which the applicants in the present case tried to make out a *prima facie* case was by raising the presumption that they had been charged for this

(1) *Ante*, Vol. IX., at p. 171.

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Rigby, L.J. accommodation or for these services; and if they could have made that out no one can doubt that that would have been a sufficient ground, unless displaced by the railway company, for a decision in their favour. That was what the applicants undertook to prove, and the onus of the proof lay upon them. The learned judge who had to decide the point held that there was no evidence in support of the case attempted to be made by the applicants—namely, that a charge for station accommodation or terminal services was included in the rates—and in so holding I think he was right. Objection was taken on behalf of the applicants to that part of the judgment of the learned judge where he said that he would not have stopped the case if there had been any evidence of a comparable rate. But I do not understand the learned judge to have meant by that that an applicant cannot establish a case without showing a comparable rate. That view would narrow the construction of section 4 too much. The learned judge simply said that the evidence of a comparable rate might have been evidence to support the case, even though the rate charged was below the maximum. He said that there was not that evidence in the present case, and that upon the rest of the evidence no case had been made out.

With regard to the judgment of Collins, J., in *Corporation of Birmingham v. Midland Ry. Co.* (¹), in my opinion the meaning of that judgment is that the applicants had taken upon themselves to show that the railway company had charged for station accommodation or for terminal services, and that they were entitled to a rebate. The learned judge was quite right in saying that the onus of proving that case lay upon the applicants. They had to show a *prima facie* case calling for an answer from the railway company. In the present case the applicants endeavoured to make out that they had been charged for station accommodation for terminal services, and the learned judge said—and I agree with him—that there was no *prima facie* evidence in support of that case. That was the only case which the applicants tried to make out. I do not think—and in this I may be differing from my brother A. L. Smith, L.J.—

(¹) *Ante*, Vol. IX., at p. 169.

that the section shuts out the applicant from making another case. An applicant can make any case which reasonably shows his right to an allowance or rebate, and I cannot think that he is confined to proving that the rate charged does in fact include a charge for station accommodation or terminal services.

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VAUGHAN WILLIAMS, L.J.: As I understand, my brother Wright in the present case and my brother Collins in *Corporation of Birmingham v. Midland Ry. Co.* ⁽¹⁾ have both decided in clear terms that when a trader comes before the Railway Commissioners to invite them to exercise their jurisdiction under section 4 of the Railway and Canal Traffic Act, 1894, it is part of the onus which is thrown upon the trader that he shall give *prima facie* evidence that he is being charged by the railway company in respect of accommodation or services which the railway company have not provided or rendered, by reason of the siding or branch railway at which the merchandise is received or delivered belonging to the trader and not to the railway company. Unless I held a strong opinion upon the point, I should not easily have persuaded myself to express an opinion differing from that of those two learned judges, who are very familiar with the particular subject-matter. When in addition to that I take into consideration the judgment just delivered by A. L. Smith, L.J., my difficulty in expressing any different opinion is greatly enhanced. At the same time I think it my duty to express what my view is 'as to the construction of the section, and also to state the reasons which enable me to arrive at the same result as my learned brothers do.

As regards the construction of section 4, I do not think that the scope of the section has been quite rightly apprehended. It was treated in the argument on behalf of the railway company as if it was a section which provided that in case of past disputes—that is, in cases of an allegation of a wrong done and a remedy claimed—there should be what amounts to a statutory provision for reference to arbitration; and it was then said that, having got that statutory provision for reference to arbitration,

(1) *Ante*, Vol. IX., at p. 169.

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it could not be reasonably suggested that the party who is in the position of plaintiff was not under an obligation to prove the wrong complained of. To my mind that is not the scope of the section at all. The scope of the section, as I understand it, is to provide not only for the past, but also for the future.

What the section seems to me to say is this: Where the trader has his own siding or branch railway, and the railway company and the trader cannot agree as to what shall be the rate, or whether the rate actually charged by the railway company in the past and proposed to be charged by them in the future is a just rate, then in any such case the Railway Commissioners shall fix the rate. The Commissioners are by the section to "have jurisdiction to hear and determine such dispute"—a different thing, to my mind, from a cause of complaint—"and to determine what, if any, is a reasonable and just allowance or rebate." I confess that I do not feel at all certain that, whenever it is proved that the trader owns a private siding or branch railway, and that he consigns goods from the siding or branch railway over the lines of the railway company, and that a charge is made by the railway company against him, the trader has not a right, upon proof of those facts, to call upon the Railway Commissioners to determine what, if any, is a reasonable and just allowance or rebate to make by reason of the fact that the railway company have not the expense and trouble of providing station accommodation or of performing terminal services. I can conceive that the Legislature might well have contemplated the great advantage it would be to the trader to have the amount of this reasonable and just allowance or rebate fixed, because, when once it was fixed, the railway company would have, in every case where they came to justify their charge, whether made or proposed to be made, to give credit for the allowance or rebate fixed by the Railway Commissioners. For these reasons I am by no means sure that the Railway Commissioners had not this duty cast upon them at the time when Wright, J., ruled that there was no evidence to support the applicants' case.

But upon the facts which the applicants themselves proved in this case I arrive at the same result as my learned brothers.

Looking at the table of charges which is before us, it seems to me to be perfectly clear upon the face of this table that the charges do not include anything for station accommodation or terminal services. In these circumstances it seems to me that the learned judge was right in saying that in this case there was no occasion for making any reasonable and just allowance or rebate in respect that the railway company did not provide station accommodation or perform terminal services, because on the face of the charges which the applicants have put in, and which they have given no evidence to displace, it is plain that the company have not charged for providing station accommodation or for performing terminal services. Under these circumstances I think that the decision was right. At the same time, as I have said, I am not prepared to say that it is necessary for the applicant to prove more than that the merchandise consigned is received or delivered by the railway company at a siding or branch railway not belonging to the company, and that a dispute has arisen between the railway company and the consignor or consignee as to the allowance or rebate to be made from the rates charged, and that upon proof of those facts only it is not the duty of the Railway Commissioners to determine what, if any, is a reasonable and just allowance or rebate both for the past and for the future. Even however if I am wrong in that, I see nothing in the Act which throws upon the applicants the duty of doing more than showing that the amount charged seems to be an unreasonable amount to charge for the service rendered by the railway company. I agree therefore in the result that this appeal should be dismissed, though I do not arrive at that result in the same way as my brothers do.

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[Solicitors for applicants: *Neish, Howell & Macfarlane.*

Solicitors for railway company: *Burchell & Co.*]

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v.

CALEDONIAN RAILWAY COMPANY AND NORTH BRITISH RAILWAY
COMPANY ⁽¹⁾.

*Rebate on Sidings Rate—Station Accommodation and Terminal Services—
Special Services at a Traders' Siding—Railway and Canal Traffic Act,
1894 (57 & 58 Vict. c. 54), s. 4.*

November 23,
24, December
23, 1898.

The applicants were the owners of a siding situated immediately to the north of the goods station at Panmure on the joint line of the Caledonian and North British railway companies, and about 73 chains from Carnoustie station and 56 chains from Barry station.

The applicants complained, under section 4 of the Railway and Canal Traffic Act, 1894, that they were charged terminals for traffic to and from their works at Panmure station, although the railway companies performed no terminal services and received and delivered the traffic on sidings not belonging to them.

The applicants' allegation that their rates included charges for station accommodation and for terminal services was based on the fact that the rates for similar traffic from the two nearest stations to Panmure, viz., Carnoustie and Barry (where there were no private sidings and no traders performing terminal services for themselves), were the same as those charged to the applicants, or differed in amount only in respect of difference of distance.

The railway companies contended that what was not a charge for conveyance in the applicants' siding rates was a charge, not by way of terminals, as in the rates with which they were compared, but for services at or in connection with the sidings, such as marshalling, labelling, clerkage, providing sheets, &c., and that it cost them as much to render those services as it did to do the work which was done at such places as Carnoustie and Barry, and for which, when done, so far as it was not incidental to conveyance, terminals were allowed them.

It was proved that whatever services the railway companies rendered at the applicants' private sidings at Panmure, they rendered also at or in connection with their own sidings at Carnoustie and Barry, and that there was nothing special or extra in them. And, further, that at Carnoustie and Barry they did a good deal besides, inasmuch as they provided a station and labour to load and cover.

Held, that the special services the applicants received at the hands of the railway companies were not a satisfactory reason for the same rates being

⁽¹⁾ Before Lord TRAYNER, and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

charged at the applicants' private sidings at Panmure as were charged at Carnoustie and Barry, and that the applicants were entitled to have lower rates than the rates in force for similar traffic at Carnoustie and Barry. The extent to which they should be lower to be determined by the amount presumably charged for terminals at that end, ascertained on the principle adopted in *Pidcock's Case* ⁽¹⁾, less the reasonable sum that might be found due to the railway companies for special services under section 5 of the schedule to the Rates, &c., Order Confirmation Act.

Where a railway company provide station accommodation, or perform terminal services, it is only reasonable to suppose that station and service terminals are equally with the charge for conveyance a component part of their rates.

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THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894. The application, so far as material, was as follows:—

“1. The respondents are the joint owners of a railway known as the Dundee and Arbroath Joint Line, which is worked and carried on by the Dundee and Arbroath Joint Line Committee, constituted under, and with the powers contained in, the North British Railway Dundee and Arbroath Joint Line Act, 1879.

“2. The applicants are chemical and artificial manure manufacturers at Carnoustie, in the county of Forfar, and their premises are connected with the said railway of the respondents by means of a siding not belonging to the respondents.

“3. The said siding is situate immediately to the north of the goods station at Panmure on the said railway, and is about 73 chains from Carnoustie station and 56 chains from Barry station.

“4. The applicants' siding consists (*inter alia*) of three lines of rails running parallel to the respondents' railway, and in close proximity thereto, together with a branch line running into the applicants' works, which is at right angles to the said three lines, and connected therewith by means of turntables.

“9. The applicants receive at their said siding over the railway of the respondents large quantities of merchandise in classes A, B and C, and they consign therefrom over the said railway large quantities of packed manure, feeding cakes, nitrate of soda, sulphate of ammonia and other articles.

(¹) *Ante*, Vol. IX. 45.

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"10. All the services of loading, unloading and uncovering required for the said traffic at the said siding are performed by the applicants and upon their own land entirely, and as regards certain merchandise the service of covering also is so performed by the applicants.

"11. Notwithstanding that the respondents do not and will not hereafter be required to provide station accommodation or perform terminal services for the applicants' traffic at the Panmure end of the journey, they have refused to make and they refuse hereafter to make any allowance or rebate to the applicants in respect thereof.

"12. The rates charged by the respondents and paid by the applicants in respect of the said traffic since the 31st day of December, 1892, have included charges for station terminal and as regards certain class C traffic charges for service terminals at the Panmure end of the journey. Such charges were illegal. The applicants paid the same under duress."

The joint answer of the railway companies, so far as material, was as follows:—

"2. The respondents admit that the applicants are chemical manufacturers carrying on business at Carnoustie, and that their premises are connected with the joint line by means of a siding or sidings, but the respondents deny that the siding or sidings in question do not belong to them.

"3. The applicants' manufactory and other premises are situated at Panmure on the joint line, where there is a public station or siding for goods traffic but not for passenger traffic.

"4. The sidings by which the applicants' premises are connected with the joint line at Panmure consist of three lines of rails situated north of and running alongside the main line and parallel to each other, and having a junction with the main line, with the usual junction points, levers, and signals, on the main line. There is also a turntable on each of two of the sidings.

"7. The sidings in question have all along been used both by the applicants and the respondents for the accommodation of the traffic to and from the applicants' premises at Panmure. All the merchandise or other traffic of the applicants is received by the respondents from the applicants or delivered by the

respondents to the applicants at the sidings in question, and the traffic is covered, checked, labelled, and otherwise accommodated and dealt with by the respondents at those sidings before or after conveyance, as the case may be. The only service performed by the applicants is that of loading, unloading, and uncovering their own traffic.

"8. The applicants by letter of date February 22, 1895, made complaint to the Board of Trade under section 31 of the Railway and Canal Traffic Act, 1888. The specific matters of complaint were the following, viz. :—

- (1) Increase of certain specified rates subsequent to 31st December, 1892.
- (2) Undue preference or advantage given to other traders.
- (3) Claim for rebates in respect of their alleged private siding.

"The applicants' complaint was entertained by the Board of Trade, and after a considerable correspondence between the applicants and the respondents a meeting was arranged between the applicants and the respondents. That meeting was held at Dundee on July 22, 1895, and was attended on behalf of the applicants and on behalf of the respective respondents. Subsequent to January 1, 1893, and prior to the complaint to the Board of Trade, the applicants refused to pay in full the accounts incurred to and rendered by the respondents for the carriage of their traffic to and from their premises at Panmure; but on May 3, 1895, the applicants agreed to pay the accounts in full under protest, and without prejudice to their rights pending disposal of their complaint to the Board of Trade.

"9. The meeting in question was held for the purpose of discussing and endeavouring to settle the matters of the applicants' complaint to the Board of Trade, and at that meeting all the matters of complaint were discussed, and an agreement in regard to such matters made by the parties. The parties adjusted the rates to be paid by the applicants, and it was specifically stipulated that the applicants should accept such adjustment of rates as a final settlement of the rates question between them and the respondents. It was further specifically stipulated that the rates so adjusted should be paid in full in future.

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"10. At the said meeting it was arranged that the applicants should intimate to the Board of Trade that, an amicable arrangement having been arrived at, they desired to withdraw their complaints, and the applicants accordingly did so by letter of date August 14, 1895, addressed by them to the Board of Trade. The Board of Trade in their fifth report presented to Parliament of date March, 1897, containing a report of the proceedings under section 31 of the Railway and Canal Traffic Act, 1888, and section 1 of the Railway and Canal Traffic Act, 1894, report as follows in reference to the applicants' complaint of February 22, 1895, viz.:—'After correspondence, complainants informed the Board of Trade that they had come to a settlement with the railway companies.'

"11. At the said meeting it was also agreed that the adjustment of rates then arranged should apply as from January 1, 1893, and that the accounts incurred to the respondents by the applicants subsequent to that date should be made out and adjusted accordingly, and any overpayment made by the applicants to the respondents should be refunded by the respondents. The accounts were accordingly so adjusted, and it was found that in consequence of the adjusted rates being in certain cases less than the original rates, a sum of £248 : 6s. 3d. was repayable to the applicants, and that sum was paid by the respondents to the applicants on December 11, 1895.

"12. The negotiations resulting in the agreement come to by the applicants and the respondents at the meeting held on July 22, 1895, and the agreement itself, as also the adjustment of rates, the withdrawal of applicants' complaint to the Board of Trade, the adjustment of the accounts incurred since January 1, 1893, and the payment back by the respondents to the applicants of the amount accruing to the applicants on such adjustment of accounts, all took place without any reservation by the applicants of any right to claim rebates in respect of the rates in question including charges for station accommodation and terminal services not performed by the respondents; and the whole actings of parties proceeded and were concluded on the understanding and condition that the agreement come to was a final settlement of all questions and claims between the

applicants and respondents. The meeting took place on July 22, 1895, and it was not till January 10, 1896, that the applicants raised any question as to or made any claim for deduction of rebates from the rates in respect of station or service terminals.

"13. The rates charged by the respondents to the applicants are, as regards a large quantity of the applicants' traffic, exceptional rates, that is to say, rates for specific articles of merchandise charged by the respondents voluntarily and under no statutory obligation less than the ordinary or class rates applicable to the respective classes of merchandise within which such specific articles fall; and all rates charged, whether ordinary or exceptional, are less than the statutory maxima chargeable by the respondents under the Railway Rates and Charges, No. 19 (Caledonian Railway, &c.) Order Confirmation Act, 1892. The rates in question charged by the respondents to the applicants do not exceed the charges which the respondents are entitled to demand in respect of conveyance and other accommodation or services provided or rendered by the respondents to the applicants, and the respondents admit that they refuse to make any allowance or rebate from such rates to the applicants.

"14. The respondents, as regards the rates charged to and paid by the applicants in respect of their traffic since 31st day of December, 1892, deny that such rates included any charge in respect of any accommodation or services not provided or rendered by the respondents to the applicants, and the respondents further deny that the rates in question were paid by the applicants in duress."

The reply, so far as material, was as follows:—

"3. The outgoing traffic of the applicants is marshalled by the applicants' servants upon the said siding, arranged by them in readiness for conveyance and handed over to the respondents' servants at the boundary between the applicants' siding and the respondents' railway. The only service not incidental to conveyance which has been performed by the respondents has been the covering of a certain portion of the traffic, a service which the applicants are now performing and will hereafter perform for themselves. If the respondents have entered upon the

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siding in order to cover the last-mentioned traffic or to perform any of their duties as conveyers of the traffic (which the applicants do not admit) it has been for their own convenience and not at the request of the applicants.

"4. Inwards traffic is conveyed by the respondents to the points situate at the boundary between the applicants' siding and the respondents' railway, and the applicants accept delivery there; and all services subsequent to such conveyance and all the accommodation necessary for unloading or otherwise dealing with the traffic are performed and provided by the applicants.

"6. The applicants admit that they lodged a complaint with the Board of Trade, and that certain meetings were held which resulted in an amicable settlement being made by them with the respondents of certain disputes relating to the increased charges for the carriage of their goods which the respondents were attempting to enforce, a matter which is not raised or re-opened by the application. The question of sidings rebates formed no part of the said settlement.

"7. The applicants at the time of the said settlement excluded the rebate question therefrom; and indicated this fact both to the respondents and the Board of Trade. In the report referred to in the tenth paragraph of the answer, the nature of the complaint withdrawn by the applicants is accurately described by the Board of Trade as a complaint with reference to the 'increase of 363 rates for the conveyance of packed manures.' The applicants only withdrew from the Board of Trade their complaint with regard to the said increased charges for the carriage of their goods; and such withdrawal they adhere to.

"8. If the respondents failed to appreciate this fact, and did not agree thereto, no settlement or real agreement was come to.

"9. The settlement referred to was not final.

"10. The said settlement did not purport to, and could not, deprive the applicants of their statutory rights under section 4 of the Railway and Canal Traffic Act, 1894.

"11. If the said settlement can be construed to include a withdrawal of the applicants' claim to a station and service terminal rebate at their said siding, the applicants did not so

understand it; and they repudiate the same, and revoke any consent to the said settlement given under a misapprehension."

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Shaw, Q.C., Clyde and Neish, appeared for the applicants.

The Lord Advocate (Graham Murray, Q.C.), Balfour, Q.C., and Grierson, appeared for the railway companies.

LORD TRAYNER: In this case the Court is asked to pronounce an order (1) determining what are the reasonable and just rebates to be hereafter made by the respondents from certain rates charged by them to the applicants; (2) directing the respondents to repay to the applicants the sum of 4,708*l.*; and (3) alternatively, to find the respondents liable to the applicants in the said sum of 4,708*l.* as damages.

It is convenient to dispose, in the first place, of the second and third heads of this prayer, the facts in connection with which may be shortly stated. The applicants have a siding for the use of their works adjoining the respondents' railway at Carnoustie. A very small part of the siding is placed on the ground belonging to the respondents, but the parties have in this case treated, and I think rightly treated, the siding as that of the applicants,—as one "not belonging" to the respondents. With regard to the merchandise received at, or dispatched from that siding, the respondents have (according to the averments of the applicants) charged rates which included charges for station accommodation, and also for terminal services, which were neither afforded nor rendered by the respondents. These averments are denied by the respondents, who maintain the correctness of their charges on several grounds, but also maintain, separately that all inquiry on this head is excluded by reason of an agreement entered into between the parties in July, 1895. If this latter defence is well founded, it is unnecessary to consider the other grounds of defence stated. With regard to the alleged agreement, the facts stand thus. On 22nd February, 1895, the applicants wrote to the Board of Trade complaining (1) that the rates or charges of the respondents (which had been increased since 31st December, 1892) were

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This letter having been, on 5th May, 1895, communicated to the respondents by the Board of Trade, the respondents, on 15th June, 1895, wrote in reply stating the grounds and principle on which the rates complained of had been fixed, that they were fair and reasonable in themselves, and added "The complainants have no claim for any rebate in respect of the siding, inasmuch as the rates to and from the siding in question have been arranged in view of all the circumstances under which the traffic is worked." Having these letters before them, the Board of Trade suggested that before any action on their part, the parties should meet and endeavour to adjust the differences between them. Acting upon this suggestion, the parties did meet, and ultimately, on 22nd July, 1895, came to an agreement which is set forth in a minute of that date. The parties are not agreed as to what that minute means: the Court must therefore construe it. Some evidence was led as to what the parties "understood" they were agreeing to. This evidence was admitted (under objection), because it was thought that under the general question some explanations might be given, tending to throw light upon the agreement, and aid in its construction. Nothing, however, was said on either side beyond this: the applicants' witness, Mr. Colquhoun (who represented the applicants at the meeting I have referred to), said that he did not understand that the agreement referred to included the question of rebates, while the respondents' witnesses said that they understood that it did. But such evidence is of no effect as modifying or altering the terms of the agreement. What the parties did agree to, is the question, not what the parties understood they were agreeing to, or intended to agree to. If the agreement proceeded upon essential error, or other ground which would be relevant to set it aside, that of course can be established in the proper action. But the agreement standing as it does must be read as expressing what the parties did and intended to do. Even if the parol evidence as to the understanding of parties were to be taken into account, that for the

respondents would decidedly preponderate; not merely because of the greater number of their witnesses, but because the applicants' one witness was not in all respects quite satisfactory. His recollection was obviously defective on several points, which appeared from the fact that in more than one instance in the course of his examination he had (in speaking to matters of fact) to explain and sometimes withdraw statements previously made. On the parol evidence, it appears to me that the applicants' view of the understanding on which the agreement was made has not been established. But apart from the parol evidence altogether, I am of opinion that the agreement did extend to, and cover the question of rebates. It is not without importance to notice that the applicants deliberately considered (or at all events had the means and opportunity of doing so) the terms in which the agreement was expressed in the minute of 22nd July, 1895. Mr. Hamilton states that, acting for the railway companies, he sent the minute to Mr. Colquhoun in order that he might alter it, if not correct in any way, and that it was returned unaltered and signed. The case therefore stands in a less favourable position for the applicants than it might have stood had the minute been written out at the meeting and at once subscribed, without time being allowed to the applicants or their representative to consider the terms in which it had been expressed. To turn now, however, to the terms of the minute itself, keeping in view that the meeting at which it was agreed to was a meeting for the purpose of adjusting and settling amicably the matters on which the applicants had complained to the Board of Trade. Their complaints, as I have already pointed out, were (1) increased rates which were unreasonable; (2) undue preference to other traders; and (3) rebates in respect of their private siding. The second of their complaints does not appear to have been insisted in, and no more need be said about it. The result of the meeting was, that certain rates having been agreed upon, the applicants accepted them "as a final settlement of the rates question" between them and the respondents, and undertook to advise the Board of Trade "that an amicable arrangement having been arrived at with the railway companies, they desire to withdraw

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1898. their complaints." Now, the words "rates question," if they stood alone, might possibly bear the construction put upon them by the applicants. They say these were station-to-station rates, and had nothing to do with terminals. But when it is remembered that the rates which the applicants and respondents agreed to were the entire rates to be charged by the respondents, from point to point, on the applicants' goods, it is at least probable that they included what had been complained of as terminal charges, and in respect of which they claimed to be entitled to a rebate. When, however, it is added that in respect of the "amicable arrangement" which had been arrived at, the applicants undertook to advise the Board of Trade that they "desire to withdraw their complaints," I think it is the fair reading and import of the agreement that the applicants withdrew *all* their complaints, one of which was concerning the rebates to which they said they were entitled, and which had not been allowed to them. Further, there is no reservation of any ground of complaint, or anything in the language of the agreement necessarily pointing to the view that only part of the differences between the parties had been adjusted, leaving other parts to be subsequently discussed, either judicially or extra-judicially. There are two other points in the agreement which tend in the same direction. First; in respect of the agreement come to, the applicants agreed to pay the accounts for carriage (that is the rates agreed upon) "in full when due." This appears to me difficult to reconcile with the idea that the agreed on rates were to be subject to any reduction or rebate. They were to be paid "in full." Secondly, the rates agreed upon being somewhat less than those which had been charged between 1st January, 1893, and the date of the minute, it was agreed that the agreement should have a retrospective effect, and a certain "rebate be allowed" to the applicants on the rates they had already paid. Now, the word "rebate" here used does not mean the same thing as the "rebate" claimed in respect of the private siding—it means an allowance or return of rate already paid in excess of that which had then been agreed upon. But the use of the word indicates to me that at the meeting when the agreement had been come to, the question of "re-

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bates" proper had been the subject of agreement which suggested the use of that word instead of "return" or "allowance," which technically would have more correctly expressed what the respondents were agreeing to. This, however, is probably not entitled to much weight; it is perhaps of more importance to notice, that in pursuance of the concession thus made by the respondents, a sum of money (over 240*l.*) was repaid to the applicants, who, on receiving it, as an adjustment and settlement of the account between them and the respondents up to that date, made no reservation of any claim which they had or claimed to have for rebate in respect of their private siding. On the whole matter, I am of opinion that the agreement in question was intended to cover, and did cover, the question of rebates which the applicants are now insisting in.

The view I have thus taken of the construction of the agreement affects not only the rebates claimed from charges or rates exacted before its date, but the claim now made in its entirety. I think the agreement fixed, as of consent, special rates to be paid in full, by the one party to the other, which were not open to objection or challenge until one of the parties intimated that they would no longer abide by the agreement. This either party was entitled to do at any time, for the agreement was not for any specified term of endurance. I hold it proved as matter of fact, and in this my colleagues concur, that no intimation was given by the applicants until the service of the present application, that the applicants would no longer abide by the agreement, but intended to resort to their rights at law, whatever these rights might be. The whole claim here made is for rebates on charges incurred and paid prior to the service of the application to us; and in our opinion this claim cannot be allowed. The agreed-on rates were to be paid "in full"—and the applicants cannot get any reduction therefrom, during the existence of the agreement. The applicants allege that they protested against the respondents' charges soon after the date of the minute which set forth the agreement, and that their claim at all events is good from the date of their protest. The proof of this protest is said to be contained in certain cheques which the applicants sent to the respondents. These cheques no doubt

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1898. contain the words "without prejudice and under protest," but
 TENNANT & Co. nothing is said there or elsewhere which indicates that the
 * protest had reference to the rebates now claimed. The protest
 CALEDONIAN is, as I have quoted it, in the most general terms, and might
 RY. Co. AND mean a protest against liability for the whole amount for which
 NORTH the cheques were granted. We find, as a matter of fact, that
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 RY. Co. no such protest was made as the applicants allege, and that
 Lord Trayner. they continued to pay the charges in full, without any protest
 bearing upon the question of rebates. We therefore think that
 the application, in so far as the second and third heads of the
 prayer are concerned, should be refused.

With regard to the first head of the applicants' prayer, I agree in the opinion of Sir Frederick Peel.

SIR FREDERICK PEEL: The applicants in this case complain that they are charged terminals for traffic to and from their works at Panmure Station on the joint line of the respondents, the Caledonian and North British Companies, although the companies perform no terminal services, and receive and deliver the traffic on sidings not belonging to them. The position of the sidings is this: they run parallel to the railway, and the three lines of which they consist are laid on land belonging to the applicants, with the exception of one rail of the line nearest the railway, which is situate within the companies' boundary. The respondents in their answer claimed to be the owners of these sidings, but it was conceded by the Lord Advocate that they were mistaken in this view, and it was proved by letters to the applicants on matters connected with the sidings, which their secretary wrote from time to time, that they had always regarded the sidings as the private property of the applicants.

The consignments to and from these sidings are of articles in classes A, B and C, such as packed manures, ores and coal, and besides exceptional rates with Dundee Docks for cargo lots of raw produce, special rates less in amount than the ordinary class rates are in force for much of the other traffic; and what the applicants assert is that both special and ordinary rates include, and have done so since 1892, charges for station terminals, and as regards certain class C traffic,

charges also for service terminals at the Panmure end of the journey. After the passing of the Act of 1888, the rates between the Panmure private siding and stations on the joint line, or on the Caledonian or North British line were revised, and in February, 1895, the applicants complained to the Board of Trade under section 31 of that Act as to, in particular, the rates for the conveyance of their packed manures, but a few months later withdrew their complaints, having, as they informed the Board of Trade, arrived at an amicable arrangement with the railway companies regarding accounts for carriage of goods. The rates so arranged appear to be the same as those now in question, but either party to the arrangement was free to terminate it when it pleased, and the applicants must be taken to have done so when they filed their present application. The minutes of the meeting at which rates were amicably arranged make no mention of rebates for private sidings, but the applicants' letter to the Board of Trade of February, 1895, complained not only of the increase of certain rates after 1892, but also of rebates in respect of their sidings not being allowed to them. Now, the ground taken by the applicants for alleging that their rates include terminal charges, is the fact that the special rates for packed manures in 4-ton lots from the two nearest stations to Panmure, viz., Carnoustie and Barry, where there are no private sidings, and no traders performing terminal services for themselves, to Aberdeen, Montrose, Glasgow, and five or six other places, are the same as those charged to the applicants; and that class C rates to all places are also either the same from Carnoustie and Barry as from Panmure, or with no other difference between them than what has reference to the slight difference in their distances. There is nothing in the rates, looked at by themselves, to or from the Panmure private sidings to show that either a station or a service terminal is any part of them, and it is improbable, as the respondents observe, that terminals would be charged where there is no power to charge them. But where a railway company does provide station accommodation, or perform terminal services, it is only reasonable to suppose that station and service terminals are, equally with the charge for conveyance, a component part of its rates.

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The Carnoustie and Barry rates may therefore be deemed to include charges of that sort, and if, as compared with them, there is no difference of amount in the Panmure siding rates, it would seem to result that these also are made up in part of terminals, or if there is in reality no such element in them, that notwithstanding circumstances exist which make a difference in the accommodation the respondents afford, and in respect of which there ought to be a corresponding difference in the amounts charged as rates, these rates have failed to be so regulated. In either case there would be ground for an allowance under section 4 of the Traffic Act, 1894. The answer of the respondents is that what is not a charge for conveyance in the applicants' siding rates is a charge, not by way of terminals, as in the rates with which they are compared, but for services at or in connection with the sidings, such as marshalling, labelling, clerkage, providing sheets, &c., and that it costs them as much to render these services as it does to do the work which is done at such places as Carnoustie and Barry, and for which, when done, so far as it is not incidental to conveyance, terminals are allowed them. If that is made out, then, as in the *Birmingham Corporation Case* ⁽¹⁾, there may be equal rates, and yet nothing on which a just complaint can be founded. But it ought to be clear that the things compared are so alike in cost that it is fair to charge the same price for them, otherwise a trader who finds his own siding and loads and covers by his own people gets no benefit from the Act, which relieves him in such case from paying terminals. Now, whatever services the respondents render at Panmure private sidings, they render also at or in connection with their own sidings at Carnoustie and Barry; there is nothing special or extra in them. But at Carnoustie and Barry they do a great deal besides. They provide a station and labour to load and cover. This is therefore not a case which comes within the principle of the *Birmingham Corporation Case* ⁽¹⁾, and I am of opinion that the special services the applicants receive at the hands of the respondents are not a satisfactory reason for the same rates being charged at Panmure sidings as are charged at

⁽¹⁾ *Ante*, Vol. IX. at p. 172.

Carnoustie and Barry. The applicants are, I think, entitled to have lower rates than the rates in force at Carnoustie and Barry; the extent to which they should be lower to be determined by the amount presumably charged for terminals at this end, ascertained on the principle adopted in *Pidcock's Case* ⁽¹⁾, less the reasonable sum that may be found due to the respondents for special services under section 5 of the schedule to their Rates, &c. Order Confirmation Act.

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The applicants make a claim for damages, and for the relief they ask for being given from 1st January, 1893. But as to that particular date, damages in a case laid upon section 4 of the Traffic Act, 1894, could not, I think, under any circumstances be given for any time prior to the passing of that Act, as section 4 was a new enactment and was not made retrospective. But what seems to me to dispose altogether of this claim is the Agreement of 22nd July, 1895, to which I have already referred. That was an arrangement as to rates, and regarding accounts for carriage of goods, and it was accepted by Mr. Colquhoun, acting for Messrs. Tennant, as a final settlement of the rates question between his firm and the railway companies. It took effect, as stipulated in it, from January, 1893, and it was binding on the applicants up to the time when they filed their present application. To get an allowance off their rates in respect of their sidings was one of the reasons the applicants had for going to the Board of Trade in February, 1895, and that was surely a rates question, and one regarding the accounts for the carriage of their goods, and when, as the result of that reference to the Board of Trade, an agreement is made which is accepted by the applicants as a final settlement of the rates question between them and the railway companies, it must, I think, be construed as including the matter of an allowance or rebate for the past.

LORD COBHAM concurred.

⁽¹⁾ *Ante*, Vol. IX. at p. 64.

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Solicitor for the Caledonian railway company: *H. B. Neave*,
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Solicitor for the North British railway company: *James
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COLNE VALLEY AND HALSTEAD RAILWAY COMPANY AND GREAT
EASTERN RAILWAY COMPANY ⁽¹⁾.

Rebate on Sidings Rate—Siding “not belonging to the Company”—Station Accommodation and Terminal Services—Clerkage—Signalling—Shunting—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4—Unreasonable Delay in forwarding Trucks—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2.

If the mode in which a junction with the siding of a private owner has been effected is such that a railway company need incur no greater expense in connection with it than is involved in stopping a goods train specially at the siding junction, and either uncoupling trucks there and depositing them in the siding clear of the points, or drawing out trucks ready marshalled and attaching them to the train, doing no work within the siding, and being paid for any special use of levers by signalmen in a signal box, there is then a mere delivery for which no extra payment is due.

*November 14,
16, 29, 1899.*

The applicants were the owners of a private siding near the Halstead station of the Colne Valley railway company. Partly from the siding having only one line for both outgoing and incoming trucks, and partly from its joining the main line at a very short distance from where that line crosses a street in Halstead, on the level, so bringing the case under the rules of the Board of Trade as to the shunting of trains over a level crossing, and engines standing across the same, it was not possible for a goods train to stop at the siding junction and for its engine to uncouple a truck and deposit it in the siding or to draw a truck out and unite it to the train. All trucks to or from the applicants' siding had to be taken into the goods yard at Halstead station and there prepared for despatch or delivery, a process which involved extra hauling and the provision of standing room.

In connection with the applicants' siding traffic the railway company had to specially provide points and signals, and the levers which worked them were only required for such traffic.

The railway company charged the applicants, on traffic to and from their siding, rates the same in amount as the rates charged as station to station, or collected and delivered rates, as the case might be, on similar traffic using the Halstead station.

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBHAM, sitting at the Royal Courts of Justice, London.

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Upon an application to the Commissioners under section 4 of the Railway and Canal Traffic Act, 1894, to determine what was a just and reasonable rebate to be made from the rates so charged to the applicants, the Court found that, in respect of the applicants' siding traffic, the Colne Valley and Halstead railway company did not provide the accommodation nor render the services, or any of them, for which station and service terminals were chargeable, but that they rendered certain other services in respect of that traffic, namely, some clerkage, shunting and signalling, for which a payment ought to be made to them. The Court held that a reasonable and just allowance or rebate to be made from the rates charged to the applicants, in the circumstances above described, would be so much of each rate as is not applicable to, or charged for, conveyance, less the following sums:—

- (1) A sum for clerkage equal to 30 per cent. of the charge the railway companies make in any rate as a station terminal at the Halstead end ;
- (2) A sum for shunting equal to the station terminal at the Halstead end ; and
- (3) In respect of the cost of signals, being a cost bearing the same proportion to the cost of all the signals in the siding signal box as the number of siding levers bears to the whole number of acting levers in that box, multiplied in each case by the average number of times they are respectively daily worked, such sum as the cost so ascertained works out at per ton of the siding traffic.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894. The application was as follows:—

"1. The applicants manufacture iron goods at Halstead in the county of Essex ; and their premises, which are near to the Halstead station of the Colne Valley and Halstead railway company, include a siding not belonging to the railway company.

"2. Merchandise is consigned to and from the applicants' said siding over the railways of the respondent companies. The inwards traffic is chiefly in classes A, B and C ; and the outwards traffic consists chiefly of manufactured articles in Classes C, 1, 2, 3, 4 and 5 of the statutory classification.

"3. All the services of loading and unloading, and covering and uncovering (if and when required), at the Halstead end of the journey, are performed by the applicants and take place upon their said siding.

"4. The rates charged by the respondents for the applicants' said traffic are of the same amount as those in force for similar merchandise consigned to or from Halstead station.

"5. In the case of articles in classes A and B these rates include charges for a station terminal at Halstead. In the case of articles in class C they include charges for station

terminal and service terminals at Halstead. In the case of articles in classes 1 to 5, the said rates include charges for station terminal and service terminals at Halstead station, and for cartage to or from that station.

"6. Notwithstanding that in respect of the said traffic to and from the applicants' said siding the Colne Valley and Halstead railway company does not at Halstead provide station accommodation or perform terminal services or render the service of cartage, the respondents refuse to make any allowance or rebate to the applicants in respect thereof.

"7. The applicants claim that the said charges for station and service terminals and for cartage are illegal, and that they are entitled to reasonable rebates.

"8. In addition to the traffic above referred to, all of which is consigned to or from the said siding, the applicants receive and forward merchandise at and from Halstead station; and they themselves cart such merchandise between their works and the station. The rates in respect thereof appearing in the rate book, and charged to the applicants, include a charge for cartage in Halstead; but the Colne Valley and Halstead railway company refuses to make any allowance to the applicants in respect thereof.

"9. The applicants maintain that the levying of a charge for cartage at Halstead, upon the traffic mentioned in paragraph 8, is illegal.

"10. For some months past negotiations relating to the above matters have been carried on, but without result; and the Colne Valley and Halstead railway company has during such period subjected the applicants and their outwards traffic to unreasonable prejudice and disadvantage, in particular by failing to supply sufficient wagons and rolling stock and by unreasonable unpunctuality and delay in the collection of the applicants' traffic."

The applicants applied to the Court for an order—

1. Determining what are the reasonable rebates to be made by the railway companies from the rates charged to the applicants upon merchandise traffic passing to or from the private siding of the applicants, and ordering the railway

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companies to allow to the applicants the amounts of such rebates.

2. Ordering the railway companies to pay to the applicants the sum of 300% as damages or repayment of overcharges in respect of the said railway companies' alleged illegal overcharges since the 1st day of January, 1895.

3. Restraining the Colne Valley and Halstead railway company from subjecting the traffic of the applicants to undue and unreasonable prejudice and disadvantage in respect of the supply of wagons for their outwards traffic and the punctual and regular conveyance thereof, and enjoining the said Colne Valley and Halstead railway company to provide and employ all proper and sufficient wagons and rolling stock and plant for the working of the applicants' outward traffic, and to convey the same with punctuality and without delay.

The answer of the Colne Valley and Halstead railway company was as follows:—

"1. As to paragraph 2 of the application, the facts are that about two-thirds of the applicants' whole traffic is mineral inwards traffic, the remaining third being partly station-to-station traffic and partly traffic carried at cartage rates.

"2. The respondents admit paragraph 3, but do not admit paragraph 4 of the application; nor do they admit paragraph 5, which refers to rates to and from Halstead station, except that they admit that a charge is included for collection or delivery at Halstead station in the case of rates to and from that station which are expressed to be collected and delivered rates.

"4. The bulk of the applicants' traffic to and from the said siding is carried at exceptional rates, fixed specially for and in reference to the applicants' traffic. They do not include any station or service terminal, and were intended to apply to, and are, in fact, made use of by, the applicants' traffic only. In some cases where traffic is carried for the applicants at class rates, which also apply to Halstead station traffic, those rates have been fixed for and with reference to the applicants' siding traffic, and if any station or service terminal is included in the rate for traffic to and from Halstead station, it is not greater than the sum which the applicants should pay for services and

accommodation rendered and provided for their siding traffic which the rate was intended to cover.

"5. In cases in which the charges made for the applicants' siding traffic are not specially fixed in reference to their traffic, but the rates made for traffic to and from Halstead station are applied, if any station or service terminal is included in the Halstead station rates, which the respondents do not admit, the value of the services and accommodation received by the applicants in respect of their siding traffic is at least as great as the sum included in the rate to and from Halstead station for station and service terminals.

"6. The respondents, in fact, perform services and provide accommodation for the applicants' traffic, the value of which exceeds that of the services and accommodation performed and provided for traffic using the Halstead station. The applicants' siding, although mainly on the applicants' land, was made at the respondents' expense, and has been repaired by them, and they have provided the necessary signalling apparatus for enabling traffic to pass to and from the siding, and have paid the expenses of working their signals. The applicants, in consideration of these services, and having regard to the cost of working traffic into and out of the siding, which is very considerable, owing to the situation of the siding, and having regard to the fact that the respondents are required to perform work off their railway which they are under no obligation to do, agreed that they would pay the same rates as were from time to time in force to and from Halstead station, although many of these rates included cartage. During the continuance of this arrangement many exceptional rates have been fixed with special reference to the applicants' traffic, and less in amount than the Halstead station rates; but in respect of rates not specially fixed, this arrangement continued in force until January, 1895, and has been acted upon, by mutual consent, from that date till May, 1897, when an objection was made thereto.

"7. The respondents contend that the services they perform, and the accommodation they provide for the siding traffic, are in all cases equivalent, and in many cases more than equivalent, to the terminal services and accommodation utilised by traffic

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to and from the Halstead station, and that the applicants are therefore not entitled to any rebate for station or service terminals. The respondents further contend that the applicants are not entitled to any rebate in respect of the cost of cartage, on the ground that the arrangement which the applicants agreed to was, and is, a fair all-round arrangement. In the case of mineral traffic, and station-to-station traffic generally, the services and accommodation performed and provided for the siding traffic were considerably more than equivalent to the service and accommodation performed and provided for station traffic, and to equalise this it was agreed that the respondents should be paid the whole of rate to the station, including the charge for cartage in the case of other goods.

"8. The rates referred to in the application are voluntary rates in respect of which the applicants are not entitled to a rebate.

"9. The applicants are not entitled to claim any rebate in respect of exceptional rates of which they have taken advantage to send their traffic and cannot now repudiate.

"10. The traffic, in respect of which a rebate is claimed, has been sent, and the rates charged by the respondents upon that traffic have been paid by the applicants, with a full knowledge of
 • all the circumstances under which the rates were charged to their siding, and to the station at Halstead, and they are not entitled to recover any of the sums which they have paid.

"11. Complaint has not been made to the Court within one year from the discovery by the applicants of the matter complained of, and no damage can be awarded. The respondents deny that the applicants are entitled to any damages.

"12. The respondents deny the several allegations contained in paragraph 10 of the application. While the respondents do not admit that they are under any obligation to supply wagons to the applicants, wagons have been supplied to the best of the respondents' ability to satisfy their requirements, and there has been no unreasonable unpunctuality or delay in the collection of the applicants' traffic."

As the rates in dispute were all through rates, the Great Eastern railway company were added as respondents.

The Great Eastern company by their answer stated that if the applicants were entitled to any rebate in respect of the charges made upon their traffic, they were entitled to such rebate only from the Colne Valley company, and not from the Great Eastern company. They also stated that they were not entitled to, and did not make any charges in respect of conveyance or accommodation, or services performed or afforded on the Colne Valley company's line, and that the applicants' traffic was not received or delivered by them at the applicants' siding.

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Balfour Browne, Q.C. (R. Whitehead with him), for the applicants.

The applicants cannot be charged with the cost of providing and working signals, because their traffic makes use of signals that cover various lines at a junction. The signals are worked for the protection of the passenger traffic.

The conveyance of traffic is not over until delivery has taken place, and the conveyance rate must include delivery. *Gidlow's Case* (1). The railway company are entitled to charge the conveyance rate up to the point of delivery at the applicants' siding.

WRIGHT, J.: Owing to the inconvenient position of the applicants' siding, the railway company have to haul the trucks past the mouth of the siding, and do something beyond the point at which they would naturally deliver. They must be entitled to make some charge for that.

Ernest Moon for the Great Eastern railway company.

A railway company are under no obligation to collect or to deliver for the conveyance rate. It may be a reasonable facility to deliver at a trader's siding, but it does not follow that it is a reasonable facility to deliver there for the conveyance rate.

The charge for conveyance made by the railway company to the applicants and to the traders using Halstead station is not

(1) L. R. 7 H. L. 517.

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the maximum. In *Salt Union v. North Staffordshire Ry. Co.* ⁽¹⁾ the railway company were charging their maximum rates, and they had to try and prove that beyond those rates they were entitled to charge for services under section 5 of their Rates, &c. Order Confirmation Act. There is no obligation on a railway company, where the services rendered to two traders are different, and the cost of such services is different, to carry at the same conveyance charge because the distance is the same. If the railway company perform services for the applicants which they do not perform for the traders using Halstead station, the railway company are entitled to charge the applicants for them up to the amount of their maximum conveyance rate.

In *Pidcock's Case* ⁽²⁾ the Court held that the conveyance had ended when the trucks were put off at the station siding. Conveyance comes to an end when the applicants' traffic for the siding arrives at Halstead station *beyond* the applicants' siding. The service which the railway company perform between the station and the siding is a service of delivery, not a service of conveyance.

Under the provisions of the Railway Regulation Act, 1863, no train can stand on the level crossing and deliver trucks to the applicants' siding. The way the trucks have to be delivered is, therefore, a service specially rendered to the trader at or in connection with his siding.

Clerkage is not included in the charge for conveyance. In *Hall's Case* ⁽³⁾ clerkage was held to be one of the services incidental to the business of a carrier; and it is service which a railway company are entitled to charge for as a station terminal under the Rates, &c. Orders Confirmation Acts. The signalling services are services rendered to a trader at or in connection with his siding. The railway company would not be obliged to have interlocking and other apparatus if it were not for the applicants' siding.

Batten, Q.C., appeared for the Colne Valley and Halstead railway company.

⁽¹⁾ *Ante*, p. 179.

⁽²⁾ *Ante*, p. 150.

⁽³⁾ *Ante*, Vol. V. 28.

SIR FREDERICK PEEL : The applicants in this case, who have a private siding near the Halstead station of the Colne Valley company, complain of being charged the same rates on traffic to and from such siding as the respondents charge on similar traffic to and from the Halstead station, and they claim that so far as the rates on their siding traffic include charges for cartage or accommodation or services at the Halstead station, they may be allowed a deduction or rebate off them on the ground that no such terminals are chargeable to them as regards their siding traffic. That the applicants are charged rates equal in amount to the rates at Halstead station is not denied, and that the rates on traffic dealt with at the Halstead station do contain terminals for that station is beyond doubt, for otherwise they would be in excess of what the company have power to charge. What the component integral parts of the rates are, or how much of each rate is for station and service terminals at Halstead is not stated, but it is reasonable to presume that besides cartage, where carting services are rendered, sums are charged in each ordinary rate for conveyance and as station and service terminals respectively, and are relatively as to amount what they would be if the rate was at its maximum. The railway company, in answer to the application, say that, although the rates on the siding traffic and on the station traffic are of equal amount, they are not made up in the same way. The station rate includes terminals and, if a collected and delivered rate, cartage also : the siding rate contains no such charges, but it includes instead a charge "for services at or in connection with a siding not belonging to the company." The services of this kind which they enumerate are for clerkage, signalling, shunting, and cost of construction and maintenance of lines communicating with the siding. That the siding traffic ought to pay for clerkage is admitted, and as to what the payment should be, the Colne Valley railway company estimate clerkage in connection with the goods traffic dealt with at the Halstead station, including the applicants' siding traffic, to cost them a sum per annum which, on the traffic of 1898, averages 3·8*d.* per ton, and they propose that the applicants should pay at that rate on their traffic. But the applicants

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ought not to pay more for this service than traders who pay the station terminal ; and as the cost of clerkage does not exceed—if it is not under—30 per cent. of the total terminal station expenses (according to figures in the company's tables) for which a station terminal is granted, that must be about the rate at which traders using the station pay for clerkage, and is the measure of what the applicants should pay. Sixty per cent. of their traffic (or, for the year 1898, 1,778 tons out of a total of 2,957 tons) is in classes A and B, and the remainder chiefly in classes 2 and 3, and the maximum station terminal for class A is 3*d.* ; for class B, 6*d.* ; and for classes 2 and 3, 1*s.* 6*d.* a ton. As regards signalling, it appears that 29 only out of 36 levers in the signal box are in actual use, and that of these 29, five are worked exclusively in connection with the siding, and the company claim that the siding should bear about one-sixth of the total cost (construction and working), or as 5 to 29. The applicants object to their being charged anything for signalling, but it seems to me that if there are points and signals specially provided for their traffic, and that the levers which work them would be altogether dispensed with if the siding ceased to exist, a charge such as the company claim should be allowed. Some regard, perhaps, should be had to the frequency with which the two sets of levers are moved, in fixing the proportion of the expenses to be borne by the siding, so as to make it the proportion of the levers multiplied in each case by the average daily number of times they are moved. As regards shunting, all trucks that are loaded or unloaded in the siding pass along a siding in the company's goods yard, and their doing so occasions the shunting referred to, and the question is whether or not a special payment is due for that work. The applicants say that the shunting is an incident of conveyance, and is covered by the conveyance rate, as the traffic is consigned and the trucks labelled for Portway's siding, and the siding being the place where the trucks are received or delivered by the company, the shunting is in no case either before or after conveyance, but always while conveyance is in progress. Now, if the mode in which a junction has been effected is such that a company need incur no greater expense in connection with it than is involved

in stopping a goods train specially at the siding junction, and either uncoupling trucks there and depositing them in the siding clear of the points, or drawing out trucks ready marshalled and attaching them to the train, doing no work within the siding, and being paid for any special use of levers by signalmen in a signal box, there is then a mere delivery for which no extra payment is due. Here, however, it appears that partly from the siding having only one line for both outgoing and incoming trucks, and partly from its joining the main line at a very short distance from where that line crosses a street in Halstead on the level, so bringing the case under the rules as to the shunting of trains over a level crossing, and engines standing across the same, it is not possible for a goods train to stop at the siding junction and for its engine to uncouple a truck and deposit it in the siding, or to draw a truck out and unite it to the train. These operations must, under the circumstances, be done elsewhere, and accordingly loaded trucks to or from the siding are taken into the goods yard, and are there prepared for despatch or delivery, as the case may be. This is an extra service involving extra hauling, and the provision of standing room, for which the company ought to receive some payment, and we think a reasonable sum for that purpose would be the equivalent of what in each rate constitutes the station terminal at the Halstead end. It is assumed, of course, that any Halstead cartage, or station, or service terminal included in such rate is struck off the rate as charged on siding traffic. In what the company do or provide for the above payment we mean to include the use of the lines of railway communication to which the fourth head of claim refers; and as regards the cost of construction and maintenance of the piece of line coloured green on the plan put in by the company, the presumption is that the siding owner paid them for laying down that line at the time it was constructed; while as to maintenance, it is doubtful whether under section 76 of the Railway Clauses Act, 1845, he would in any case be liable to maintain. The applicants further complain that trucks which they load each day to go south *via* Chappel, and have ready for removal at 5.15 p.m., are not sent forward by a train leaving the goods station soon after 7 p.m., but as the evidence did not

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show that there has been any unreasonable delay on the part of the company in forwarding the trucks, or that it is easy for them to bring the trucks across in the interval between 5.15 p.m. and 7 p.m., so as always to be in time for the starting of that particular goods train, there is not sufficient ground for our interference in regard to this point.

LORD COBHAM : I concur with the judgment which has been delivered. I only wish to add a few words upon the claim of the railway company to be reimbursed the cost of working Messrs. Portway's sidings signals, this being, I think, the first occasion upon which this point has been formally raised; two out of the five signal levers used are made necessary by the special circumstances of Messrs. Portway's sidings, and for the working of these there can be no doubt the firm should pay. The other three would be required, however well designed the sidings might be, and the applicants say that as these signals exist only for the protection of the passenger traffic, they should not be charged with the cost of them. But even allowing the fact to be as stated, the working of the siding signals in this case seems to be a service "at or in connection with a siding not belonging to the company," for which the railway company may demand payment under section 5 of their Charging Act, and I do not think we are entitled to refuse their claim, at all events, on the ground urged by the applicants. It may be true that if there were no passenger traffic these signals would not be required, but of course it is at least equally certain that they would not be required if it were not for Messrs. Portway's siding traffic. The applicants' argument might be relevant if, as in the case of *The North Staffordshire Ry. Co. v. The Salt Union Co.*,¹ the railway had been a mere mineral line at the time the siding was constructed and connected with it. This, however, was not the case. It was a passenger line, and the siding owners knew that if their traffic was to be carried at all it had to be carried, to use Collins', L.J., words in meeting a similar argument in the case of the *South Yorkshire Coal*

(¹) *Ante*, p. 161.

Owners v. The Midland Ry. Co.,¹ “under the conditions and at the cost upon which alone slow traffic can be conducted with a due regard for public safety on a line open to traffic of all kinds.” In contending, then, as they practically do, that their traffic should be worked on to the company’s line at a cost which could only be considered reasonable under circumstances which do not in fact exist, they are making, in my opinion, an inadmissible claim.

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WRIGHT, J. : I agree entirely with the conclusions at which the Court have arrived.

[Solicitors for the applicants : *Neish, Howell and Macfarlane.*

Solicitors for the Colne Valley railway company : *Blyth, Dutton, Hartley and Blyth.*

Solicitor for the Great Eastern railway company : *E. Moore.*]

(¹) *Ante*, p. 28.

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NORTH STAFFORDSHIRE RAILWAY COMPANY (No. 2) (1).

Traders' Salt Wagons—Railway Company exempted from providing them—Maximum Rates, including the provision of trucks by the Railway Company—Amount of Rebate—Railway Rates and Charges (No. 17) (North Staffordshire Railway, &c.) Order Confirmation Act, 1892, s. 2 of the schedule.

December 17,
1897,
January 21,
1898.

Section 2 of the schedule to the North Staffordshire Railway Company's Order Confirmation Act, 1892, enacts, that "the maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise trains; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. Provided that—(a) . . . the company shall not be required to provide trucks . . . for the conveyance of . . . salt in bulk . . . ; (b) where, for the conveyance of merchandise other than merchandise specified in class A of the classification, the company do not provide trucks, the rate authorized for conveyance shall be reduced by a sum which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade . . ."

The difference under this section which had been referred by the Board of Trade to the Railway Commissioners for decision, was as to the sum by which the rate authorized for the conveyance of salt in bulk by the railway company should be reduced, for distances not exceeding fifty miles, in respect that they did not provide trucks for the same.

Held, that the *quantum* of the rebate is a pure question of fact to be decided by the Commissioners as arbitrators, taking into consideration all the circumstances of the case, and that *prima facie* where a railway company are not required to provide a trader with trucks, the rebate for a trader's truck should be determined with regard, not to the cost to the trader, but to the sum which the conveyance rate may be deemed to include for the provision of trucks.

Held, further, that the sums by which the rates authorized for the conveyance

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

of the applicants' salt in bulk should be reduced by reason of the railway company not providing the trucks should be as follows :— 1897, 1898.

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Miles, not exceeding.	Deduction for traders' trucks.	Miles, not exceeding.	Deduction for traders' trucks.
1	1d. per ton.	26	4½d. per ton.
2	1d. "	27	4½d. "
3	1d. "	28	4½d. "
4	1d. "	29	4½d. "
5	1d. "	30	4½d. "
6	1d. "	31	5d. "
7	1½d. "	32	5d. "
8	1½d. "	33	5d. "
9	1½d. "	34	5d. "
10	1½d. "	35	5d. "
11	2d. "	36	5½d. "
12	2d. "	37	5½d. "
13	2d. "	38	5½d. "
14	2d. "	39	5½d. "
15	2d. "	40	5½d. "
16	3d. "	41	6d. "
17	3d. "	42	6d. "
18	3d. "	43	6d. "
19	3½d. "	44	6d. "
20	3½d. "	45	6d. "
21	4d. "	46	6½d. "
22	4d. "	47	6½d. "
23	4d. "	48	6½d. "
24	4d. "	49	6½d. "
25	4d. "	50	6½d. "

THIS was a reference by the Board of Trade under section 6 of the Board of Trade Arbitrations, &c. Act, 1874.

A difference had arisen between the Salt Union, Limited, and the North Staffordshire railway company as to the sum by which the rate authorised for the conveyance of salt in bulk should be reduced for distances not exceeding fifty miles in respect that the railway company did not provide trucks for the same within the meaning of section 2 of the schedule to the Railway Rates and Charges No. 17 (North Staffordshire Railway, &c.) Order Confirmation Act, 1892, which provided as follows :—"The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. Provided that (a) the provision of trucks

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is not included in the maximum rates applicable to merchandise specified in class A of the classification, and the company shall not be required to provide trucks for the conveyance of such merchandise, or for the conveyance of lime in bulk, or salt in bulk, or of the following articles when carried in such a manner as to injure the trucks of the company. . . .

(b) where, for the conveyance of merchandise other than merchandise specified in class A of the classification, the company do not provide trucks, the rate authorised for conveyance shall be reduced by a sum which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade."

The Salt Union, Limited, applied to the Board of Trade to appoint an arbitrator to determine this difference, and the Board of Trade referred it for the decision of the Railway Commissioners.

Balfour Browne, Q.C., and C. A. Cripps, Q.C. (R. Whitehead with them), for the applicants.

The principle laid down in the case of *Cowdenbeath Coal Co. and others v. North British Ry. Co. and Caledonian Ry. Co.* (¹), is that the allowance to be made in respect of private trucks is to be measured by the cost to the trader. The deduction must be made from the actual rate, not from the maximum rate.

Littler, Q.C. (Ernest Moon with him), for the railway company.

The rates charged do not include wagon hire, and the deductions should be from the maximum rate which the railway company would be entitled to charge if wagons were provided by them.

The cost to the trader is not the proper standard for determining the rebate off the maximum rate, the maximum rate being itself based on a fair remuneration to the railway company. Traders' trucks have to be returned empty without any charge, and the wear and tear on the return journey ought not

(¹) *Ante*, Vol. VIII. 251.

to be included in the traders' scale of cost. If the railway company are to pay the cost of repairing the trucks, the advantage of not being bound to supply trucks, which is conferred on them by sub-section (a) of section 2 of the Railway Companies Order Confirmation Act, 1892, is done away with.

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The allowance ought to be the rebate allowed in the case of ordinary trucks (not salt trucks).

Cripps, in reply. Sub-section (a) of section 2 was not intended to confer any money privilege on the railway company in exempting them from supplying trucks for salt; it simply brings this particular article in class B into the same position as articles in class A, for which there is no obligation to provide trucks; and it also frees the railway company from having their trucks used for a deleterious article. As regards salt wagons, the cost to the railway company would be the same as that to the trader.

WRIGHT, J.: It seems to me that there is no law in this case at all, except what may be called negative law. None of us regard the Scotch case⁽¹⁾ as purporting to lay down any rule upon this matter, and certainly not as laying down in all cases that the cost to the trader is the test. If that were the test, I should say I disagree with the legal member of the Commission if he was intending to say that, and I agree with the others who did not intend to say that. I believe he was speaking only of the facts in that particular case, where it came to the same thing whether you deal with the cost to the trader or the cost to the railway company.

Here a very different question arises. Railway companies are exempted by the Order which we are considering from the obligation to provide trucks for the carriage of goods in class A for reasons which we need not enter into here, but which were much discussed on the Order. They were also exempted from providing trucks for deleterious kinds of traffic, and one would assume that that exemption was given to them because it would not be right in laying down general lines of remuneration for a

⁽¹⁾ *Ante*, Vol. VIII. 251.

1897, 1898. railway company to bind the railway company by those general lines of remuneration in a case where specially injurious goods were being handed to them for carriage. But then it was said, that although they are not to be obliged to find the trucks, still, if they take advantage of the exemption and wish to be relieved from finding the trucks, they must, of course, give back to the trader something, because they are not doing him any service. Then what do they give him back? That is the question here to-day. I think that is a pure question of fact to be decided by the Commissioners as arbitrators, without being bound by any rules whatever, except that they must take into consideration all the circumstances. I should certainly say, as a matter of law, that they are not bound to allow against the railway company what would be the whole cost to the trader or to the company for a special kind of carriage, because it might be they would be taking away the benefit of the very exemption which section 2 has dealt with; it would be neutralising the relief, if they could only get the relief on the terms of allowing a rebate commensurate with or more than the service not given; therefore the matter seems to me to be really at large. *Primâ facie* it may be that a proper rebate would be equivalent to a proper ordinary truck allowance in the case of trucks being provided for similar traffic.

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—
Wright, J.
—

SIR FREDERICK PEEL: The rates for the conveyance of salt in bulk, as of all articles in class B, include the provision by the railway company of trucks; but a company is not required to provide trucks for salt, and when it does not provide them, the rates authorized for conveyance are to be reduced by a sum which for distances not exceeding 50 miles is to be determined, in case of difference, by arbitration, and for distances from 50 to 75 miles is 9*d.* a ton as a maximum, and from 75 to 150 miles 1*s.* a ton. The Salt Union find their own trucks, and they apply to us to fix the truck allowance to be made to them for distances not exceeding 50 miles. They propose a mileage scale rising by small increases from 1*d.* per ton for one mile to 8·81*d.* per ton for 50 miles. We have also a lower scale proposed by the railway company which, increasing from 1*d.* to 3*d.* per ton in the first 20 miles, is 1*d.* more for journeys from 21 to 30 miles, and 5*d.* and 6*d.* per ton when the distances are from 31 to 40, and

41 to 50 miles. The scale of the applicants is open to the objections that for the shorter distances it leaves the tonnage rate for conveyance less for class B than for class A, and that it claims for a distance of 50 miles as high an allowance as the Act grants for a distance of 75 miles. On the other hand, there is no maximum of 6*d.*, as the railway company's scale seems to suppose, for distances not exceeding 50 miles, except where a railway company provides trucks for articles in class A; and for articles in other classes, such as salt, the allowance for trucks not provided by a railway company may exceed 6*d.* a ton. The Salt Union have framed their scale with a view to repay the cost to themselves of finding wagons for the conveyance of salt, and as this cost, as estimated by them, works out to one-third of a penny per ton per mile, they propose a mileage scale graduated with reference to this cost. The decision of the Railway Commissioners in Scotland in the *Cowdenbeath Case* ⁽¹⁾ was quoted as an authority for taking the cost to the trader to be the proper measure of what a truck allowance should be. But in the Scotch case it was the statutory duty of the railway company to provide the trucks, and as they did not possess half the number required, the traders were compelled to have wagons of their own, and what it cost them on the average to do this was properly held to be chargeable to the railway company. The case of a company not required to provide a trader with trucks is very different, and the rebate for a trader's truck should, I think, be determined with regard rather to the sum which the conveyance rate may be deemed to include for the provision of trucks. Applying this rule, I am of opinion that the rebate should be according to the scale proposed by the railway company, except that for distances of 19 and 20, 26 to 30, 36 to 40, and 46 to 50 miles, the Salt Union should have an additional halfpenny per ton per mile.

LORD COBHAM: I concur.

[Solicitors for the applicants: *Neish, Howell & Macfarlane.*

Solicitors for the railway company: *Burchell & Co.*]

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SHIRE RY. CO.
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⁽¹⁾ *Ante*, Vol. VIII. 251.

SHEFFIELD COAL COMPANY, LIMITED,

v.

LONDON AND NORTH-WESTERN RAILWAY COMPANY,

MIDLAND RAILWAY COMPANY,

AND

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY
COMPANY ⁽¹⁾.

Undue Preference—Sufficient Notice under section 13 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).

July 16, 1897. Section 13 of the Railway and Canal Traffic Act, 1888, enacts that "in cases of complaint of undue preference no damages shall be awarded . . . unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such manner as the Commissioners shall think reasonable."

The applicants sent a letter to the London and North-Western railway company, who were the railway company admitted at the hearing to have given the undue preference complained of. Such letter, which was dated 1st August, 1895, was in the following terms:—"When I saw you in London on the 18th July, you said you would speak to the Midland railway company on the following Monday about the Birmingham Windsor Street rate from here, and that you would let me hear from you, but I have heard nothing. I am bound to say that I am not content to pay the present quoted rate."

Held, that such letter was a sufficient written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and that the right to damages therefore arose from the date of that letter.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854, complaining of an undue preference. The applicants owned collieries near Sheffield, and sent coal to the private sidings of the Corporation of Birmingham, at Birmingham, for use in their gasworks, at through rates, to which all the respondent railway companies were parties. The owners of

⁽¹⁾ Before COLLINS, J., and Commissioners Sir FREDERICK PERL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

collieries in South Staffordshire and Lancashire also consigned coal to the same private sidings. In both cases the London and North-Western railway company carried and delivered the coal into the corporation private sidings. The applicants alleged that the South Staffordshire and Lancashire colliery owners were allowed a rebate of 3*d.* per ton on coal delivered at the Birmingham Corporation's private sidings as opposed to coal delivered at the railway company's public sidings at Birmingham, and that no such allowance was made to the applicants in respect of their coal, though delivered at the same private sidings and under the same circumstances.

Since the 1st July, 1896, the rebate had been allowed by the London and North-Western railway company to the applicants, so that the undue preference was admitted, and the only matter before the Court was the question of damages.

It was admitted that the rates had been duly quoted in the rate books. The letter quoted in the headnote was sent by the applicants to the London and North-Western railway company on August 1st, 1895. On 8th June, 1896, formal written notice was given by the applicants to the London and North-Western railway company, and from July 1st, 1896, the rebate was allowed to the applicants.

Balfour Browne, Q.C., C. A. Russell, Q.C., and H. Sutton appeared for the applicants.

Cripps, Q.C. (Ernest Moon with him), for the London and North-Western railway company.

The only question is, whether the 13th Section of the Railway and Canal Traffic Act, 1888, as to "notice" has been complied with. The letter of August 1st, 1895, was not a written notice "requiring the railway company to abstain from or remedy the matter of complaint."

The formal notice of June 8th, 1896, was complied with in a reasonable time, on July 1st, 1896.

COLLINS, J. : If it could be shown that a through route was to be treated the same as a single route for the purpose of undue

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NORTH-
WESTERN
RY. CO.,
MIDLAND
RY. CO., AND
MANCHESTER,
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AND LIN-
COLNSHIRE
RY. CO.

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COLNSHIRE
RY. Co.

preference, the notice to the "receiving company" would be sufficient.

Noble, for the Manchester, Sheffield and Lincolnshire railway company :—

On the authority of *Burnard and Alger v. Great Western Railway and London and South-Western Railway* ⁽¹⁾ there is no jurisdiction to award damages against the Manchester, Sheffield and Lincolnshire railway company.

Cripps, Q.C., and *Noble* appeared for the Midland railway company.

COLLINS, J. : I think this case is susceptible of a short answer, and without going into the question that we have been discussing as to a comparison between a route made up of three different lines and one made up of a single line—without going into the question as to whether there can or cannot be an undue preference between those two routes, each taken as a whole. I think this case is susceptible of an answer upon a very short ground, namely, that I think the letter written on the 1st August, 1895, as between business men, is a practical compliance with the provisions of the 13th section of the Act of 1888. That section says that "unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint," he shall not be entitled to damages. Now is this a written notice requiring the company, the London and North-Western railway company, which is now admitted to be the company which has been guilty of this undue preference, to abstain or remedy the matter of complaint. The letter of the 1st August, 1895, says: "When I saw you on the 18th July you said you would speak to the Midland railway company on the following Monday." That is obviously in reference to a complaint—construing this as a letter passing between business men. "You said you would speak to the Midland railway

(1) *Ante*, Vol. IX. 72.

company about the Birmingham Windsor Street rate from here, and that you would let me hear from you"—that is clearly a complaint—"but I have heard nothing. I am bound to say that I am not content to pay the present quoted rate." Surely that is an ample request to them to stop charging; to abstain from or remedy the matter of complaint. It is not put in the most strict scientific language, but it is a written notice giving them thoroughly to understand that he has a complaint, and that he will not go on paying, and therefore demands that they shall cease to charge. Therefore it seems to me that practically the provisions of the statute have been complied with, and the right to damages arises from that date.

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NORTH-
WESTERN
RY. Co.,
MIDLAND
RY. Co., AND
MANCHESTER,
SHEFFIELD
AND LIN-
COLNSHIRE
RY. Co.
—
Collins, J.
—

SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitors for the applicants: *Fishers for Parker Rhodes & Co., Rotherham.*

Solicitor for the London and North-Western railway company: *C. H. Mason.*

Solicitors for the Midland railway company: *Beale & Co.*

Solicitors for the Manchester, Sheffield and Lincolnshire railway company: *Cunliffes and Davenport for R. Lingard Monk, Manchester.*]

POSTMASTER-GENERAL

v.

CORPORATION OF LONDON ⁽¹⁾.

Telephone Wires—Conditional consent of Road Authority—Objections they may take—Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 5, 9—Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 3, 4, 5.

February 10,
1898.

The Corporation of London (as successors of the Commissioners of Sewers of the City of London) on being applied to by the Postmaster-General under section 3 of the Telegraph Act, 1878, for their consent to the placing and maintaining of a line or lines of underground telegraphs under certain streets in the City of London, refused their consent, except on condition that the said line or lines of telegraphs should not be "laid for the use of the National Telephone company, unless the telephone company were prepared to provide an improved service at a reduced cost." This difference, after having been referred to the Judge of the City of London Court, was, in accordance with section 4 of the Telegraph Act, 1878, brought before the Railway Commissioners.

Held, that the following words in section 5 of the Telegraph Act, 1863—"any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) as the person or body giving consent thinks fit"—only entitled street authorities in withholding such consent to raise objections of a kind which concerned them as a street authority; and that the objection raised by the corporation was an unreasonable one, inasmuch as it did not apply to the public at large and did not affect the corporation's interests as a street authority at all.

THIS was an application under section 4 of the Telegraph Act, 1878.

The Postmaster-General, by a notice in writing dated the 28th day of July, 1897, required the consent of the Commissioners of Sewers to the placing and maintaining of a line or lines of underground telegraphs under the streets or public roads known as Newgate Street, St. Martin's-le-Grand, Cheap-

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

side, St. Paul's Churchyard, Cannon Street, Old Change, Knight-rider Street, Lambeth Hill, and Queen Victoria Street, all in the City of London.

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 OF LONDON.

The Commissioners of Sewers attached to their consent required by the said notice a condition that the said line or lines of telegraphs should not be "laid for the use of the National Telephone company unless the Telephone company were prepared to provide an improved service at a reduced cost."

The Postmaster-General objected to the said condition, and thereupon a difference arose between the Postmaster-General and the Commissioners of Sewers, and such difference was, in pursuance of the Telegraph Act, 1878, referred to the Judge of the City of London Court, being the Judge having jurisdiction within the district in which the said difference had arisen (there being no police or stipendiary magistrate having jurisdiction within the said district).

The said difference was heard and determined by the said Judge, who awarded and ordered that the said condition ought not to be attached to the consent of the Commissioners of Sewers. And he further awarded, ordered, and consented that the Postmaster-General should be at liberty to place and maintain the lines of underground telegraphs referred to.

The Commissioners of Sewers gave notice to the Postmaster-General that they were dissatisfied with the award or decision of the said Judge, and they required that the difference which had arisen between the Postmaster-General and the Commissioners of Sewers should be referred to the Railway and Canal Commissioners in accordance with section 4 of the Telegraph Act, 1878.

By the London Sewers Act, 1897, the Corporation of London became in law the successors of the Commissioners of Sewers.

The Solicitor-General (Sir R. Finlay, Q.C.) and Casserley for the Postmaster-General.

The Commissioners of Sewers have no authority under section 9 of the Telegraph Act of 1863, except as a road authority, and can only object to the laying of the wires on some ground that concerns them as a road authority.

1893. *C. A. Cripps, Q.C., and Lyttelton Chubb* for the Corporation
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The corporation, under section 9 of the Telegraph Act, 1863, have a right of absolute veto as to the laying of the wires of the National Telephone company—that is, assuming that the National Telephone company are a “company” within the meaning of that Act; and it is *a fortiori* true if the telephone company have no statutory authority at all, but are merely a licensee of the Post Office. This veto is lost by the Postmaster-General constructing junction lines with the telephone company’s lines—which are really for the use of the company—inasmuch as they afford the company’s subscribers access to the trunk lines of the Post Office.

No agreement between the telephone company and the Postmaster-General can affect the legal rights of either party as regards third parties, such as the Corporation of London.

WRIGHT, J. : As I understand the facts here, there is only one junction with reference to which the Corporation of London desire to raise any objection. The objection they do raise is not raised in any captious or unfriendly spirit, but is raised as a matter of principle, and they think that, as the supreme road authority having special powers vested in them, it is their duty to see so far as they can that companies trying to use the public streets for private purposes should be made to supply the public on reasonable terms. The corporation are trying to attain that object. The question is, whether such a right as that is conceded to them by the Legislature. The question really turns, as has been pointed out, on the 5th section of the Telegraph Act of 1863, which in general terms says that any consent by the street or road authority may be given “on such pecuniary or other terms or conditions (being in themselves lawful)” —pausing there, I think those words “being in themselves lawful” are not material here—“or subject to such stipulations as to the time or mode of execution of any work, or as to the removal or alteration, in any event, of any work, or as to any other thing connected with or relative to any work, as the person or body giving consent thinks fit.” We have

already expressed our opinion that the last part of that subsection refers to terms or conditions relating to what may be shortly described as the construction of the work. The question is whether the earlier and more general words justify the action of the corporation. "Any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) as the person or body giving consent thinks fit." Speaking for myself, I think first that the objection which is made is not of a class which it was intended these street authorities should be enabled to raise. I think the objections which they are to be entitled to raise must be objections of a kind which concern them as a road authority, and that here the objection which is raised is not in their interest as a road authority at all, and does not concern them as such. But secondly, even if they can be heard to raise an objection of that kind it seems to me that this objection which they have raised is clearly an unreasonable one. First of all, I should say it was contrary to the general principles of common law and contrary, therefore, to the probable intention of this enactment that they, the mere street authority, should have the right to exclude any portion of the public whatever. Any objections which they may raise it seems to me must be objections affecting, *prima facie* at any rate, the whole of the public, the whole of the persons who may be concerned in the matter. This objection does not apply to the whole of the public. The very essence of it is that it is an objection to the use, by a particular company, of these junctions in order that that company may be brought to terms as to their tariff. Therefore, I think that we ought to hold that the condition sought to be imposed is not a reasonable one, and not one that ought to be sanctioned by the Court.

SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitor for the Postmaster-General: *Sir Robert Hunter*.

Solicitor for the Corporation of London: *H. Crawford*.]

1898.

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 Wright, J.

POSTMASTER-GENERAL

v.

CORPORATION OF GLASGOW ⁽¹⁾.

*Telephone Wires—Conditional Consent of Road Authority—Public Interest—
Pecuniary Terms—Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 5, 9—
Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 3, 4, 5—Railway and Canal
Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 8, 17.*

July 11, 20,
1899,
January 16,
1900.

The Corporation of Glasgow refused their consent to the laying of wires by the Postmaster-General except on the condition "that such consent was not to be made applicable to the purposes of any private company or individual, whose application if made direct to the corporation could be refused by the corporation without right of appeal."

The Postmaster-General admitted that the wires when laid would be used by the National Telephone company as junction lines with the Post Office trunk lines, and stated that this would be done in pursuance of a Treasury Minute which had been laid before Parliament.

Held, that the Postmaster-General was carrying out a definite policy sanctioned by the legislature, and must be assumed to be acting in the public interest in providing facilities for the telephone company; and that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorized by the law.

Held, further, that the Commissioners under section 3 of the Telegraph Act, 1878, as "the authority by whom the difference is to be determined, may . . . give their consent either unconditionally or subject to such pecuniary or other terms, conditions and stipulations as they may think just," and therefore may fix pecuniary terms where such terms are no part of the original difference.

The Corporation of Glasgow appealed to the Court of Session under section 17 of the Railway and Canal Traffic Act, 1888, on the ground that the words in the judgment "that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorized by the law," were founded upon an erroneous view of the law, and that this had prevented the Commissioners from considering the reasonableness of the conditions which the corporation sought to have attached to their consent.

Held (by the Court of Session), that these words did not decide any question

⁽¹⁾ Before Lord STORMONTH-DARLING and Commissioners Sir FREDERICK PERL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

of legal right, but merely expressed the view of the Court that the condition was an unreasonable one; and, there being no question of law, that the appeal was incompetent.

Quære, whether the appeal from the Commissioners to a superior Court of Appeal allowed by section 17 of the Railway and Canal Traffic Act, 1888, applies to cases arising under the Telegraph Acts.

1899, 1900.

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GENERAL

v.

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OF GLASGOW.

THIS was an application under section 4 of the Telegraph Act, 1878.

The Postmaster-General, by a notice in writing dated the 21st day of December, 1898, required the consent of the corporation to the placing of a line or lines of underground telegraphs in, under, upon, over, along, or across certain streets or public roads in the city of Glasgow.

The corporation informed the Postmaster-General in writing that they were prepared to give their consent, provided that such consent was not to be made applicable to the purposes of any private company or individual whose application if made direct to the corporation could be refused by the corporation without right of appeal.

The Postmaster-General objected to the condition which the corporation had attached to their consent. Thereupon a difference arose between the Postmaster-General and the corporation, and such difference was, under and in pursuance of the Telegraph Act, 1878, referred to the sheriff of Lanarkshire. The sheriff awarded and ordered that the said condition ought not to be attached to the consent of the corporation.

The corporation being dissatisfied with the award of the sheriff, required that the difference which had arisen between the Postmaster-General and the corporation should be referred to the Railway Commissioners in accordance with section 4 of the Telegraph Act, 1878.

Shaw, Q.C. (*Craigie* with him), for the Corporation of Glasgow.

The case raises the question of principle, whether the telephone company is to get way-leaves for nothing, which, by its own admission, it was equitable and reasonable that it should pay for. The Postmaster-General ought not to be permitted to take advantage of his compulsory powers under the Telegraph Act,

1899, 1800.
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1878, where it is demonstrated that he is not doing so *quâ* a central authority, but really *quâ* an instrument of local enterprise.

The Act of Parliament itself points to the fact that pecuniary terms may be exacted by the local authority.

[LORD STORMONTH-DARLING: The terms you are asking are really asked in the character of owners of the *solum*, and not as the authority having the control of the streets. You say that as owners of the streets you ought not to be compelled to part with a portion of your roads, as owners, without compensation. That raises the question whether the statute really contemplated the case of an owner at all.]

The Postmaster-General is asking for powers not within the purview of the statute. If the Postmaster-General is really not acting as Postmaster-General, but on behalf of a commercial company or a licensee, then the Court is entitled to say that the rights of veto are not precluded. It is not contended that a Post Office purpose is to be served. If consent should be given, it should only be given on the footing of a rate for all persons using the wires, whether the telephone company or the Postmaster-General.

The Solicitor-General, Q.C. (Pitman with him), for the Postmaster-General.

The Court is not entitled to inquire into the purposes for which the Postmaster-General intends to use these wires. The corporation are a body having control of the streets so far as they are used or usable for public purposes, and have no rights of proprietorship in the "*solum*." *Glasgow Coal Exchange Co. v. Glasgow City and District Ry. Co.* (1).

The corporation are asking for payment for way-leaves, which is an incident of ownership. This is not a question between parties having private or proprietary interests, but between the representatives of the public in two capacities—one, the Postmaster-General representing the whole public using the tele-

(1) 10 Rettie, 1284.

graphs and telephones, and the other, a body, representing to a large extent the same public, so far as Glasgow is concerned.

This Court has no right to assess compensation for damage at all; that is a matter which is determined by another tribunal, under the provisions of the Lands Clauses Act.

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The judgment of the Court was delivered by Lord Stormonth-Darling.

LORD STORMONTH-DARLING: The Corporation of Glasgow, being dissatisfied with the decision of the Sheriff of Lanarkshire, dated 22nd April, 1899, on a difference between them and the Postmaster-General, have required, under section four of the Telegraph Act of 1878, that the difference should be referred to us. The difference is this: by notice dated 21st December, 1898, the Postmaster-General required the corporation, as the body having control over the streets of Glasgow, to give their consent to the placing of telegraph wires under certain streets in that city, and, by reply dated 10th January, 1899, the corporation intimated that they were prepared to give the desired consent, but only on condition that such consent was not to be made applicable to the purposes of any private company or individual, whose application, if made direct to the corporation, could be refused by the corporation without right of appeal. There was another condition stated in the reply, but no question arises with respect to it. On 17th February the Postmaster-General intimated in writing that he objected to the condition which I have mentioned, and the difference thus came to be whether the condition ought to be attached to the consent of the corporation or not. Now, the real meaning of that condition was that the Postmaster-General admittedly proposed to allot certain of these underground lines to the service of the National Telephone company, for the purpose of connecting two of the exchanges of that company, and thereby of affording access to the trunk telephone system of the Post Office. This he did in pursuance of the policy of the Department under which the trunk telephone lines were taken over in April, 1896. A Treasury minute of 23rd May, 1892 (which was laid before Parliament), had contained a general undertaking that, as far

1899, 1900.
**POSTMASTER-
 GENERAL**
 v.
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 OF GLASGOW.**
 —
**Lord
 Stormonth-
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as practicable, the Post Office would provide underground wires at an agreed rent to connect together the exchanges of a telephone company within one and the same exchange area, so that municipal authorities might not have to complain of their streets being disturbed by competitive companies; and this general undertaking had been applied to the case of the National Telephone company by article 12 of an agreement between the Postmaster-General and them, dated 25th March, 1896. It is therefore vain to say that the action of the Postmaster-General in 1898 was dictated by any sudden or special favour for the National Telephone company, or that he was thereby using for its private advantage powers entrusted to him for the public service. He was only carrying out an engagement which had been publicly announced some years before; and if it involved, as it probably did, some benefit to the company, it was none the less part and parcel of a general policy which was believed to be best in the public interest. It may be natural for the Corporation of Glasgow to feel aggrieved at the telephone company obtaining this advantage in an indirect way; for there had been, early in 1897, negotiations between them and the company which, if successful, would have led to the company acquiring extensive rights in the streets of Glasgow, and for that they were willing to pay a considerable sum. These negotiations came to nothing; and the argument for the corporation is, that the company should not now be allowed to acquire, through the medium of a public officer, privileges which were refused when applied for in its own name; at all events, that it should not now get for nothing a substantial part of what it was formerly willing to pay for. The feeling may be natural, but that is the most that can be said for it. Ever since Government took over the national telegraphs in 1869, it has been the policy of the Legislature to give the Postmaster-General a free hand in the extension of the telegraph system. He has powers and privileges which no company ever had, and practically he has never had to pay for laying wires under the streets of a town. The Corporation of Glasgow do not seek to attach any condition, pecuniary or otherwise, to the operations which he now proposes, so far as these are

unconnected with the telephone company. But we must assume that, in providing certain facilities for that company, he is acting in the public interest just as much as when he lays down wires to be worked by his own staff. I think it would be our duty to make that assumption without evidence; but it is specially easy to make it when we find that the improvement of the service of a telephone company acts as a feeder to the trunk lines belonging to the Post Office itself, and is part of a coherent scheme for the development of telephones throughout the country. It seems to me, therefore, that the corporation had no right to clog their consent with the condition that the Postmaster-General was not to exercise his undoubted right of permitting a private company or individual to use his wires. I reach that result independently of the decision by this Court in the *Corporation of London Case* ⁽¹⁾. There the corporation did not put their argument so high as that the company should not be allowed to use the wires at all, but only that it should not be allowed to use them unless it provided a better service. It was held that that was a stipulation which the corporation were not entitled to make, because it did not concern them as street authorities. Perhaps the same might be said of the contention that the company should not be entitled to use the wires on any terms. But I prefer to rest my judgment on the ground that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorised by the law. The corporation next maintained that, if consent was to be given, it should be made subject to the condition that the Postmaster-General should pay as much, proportionally, as the National Telephone company was willing to pay for permission to use the streets when it negotiated with the corporation in 1897. In reply to this it was urged that the question of terms formed no part of the original "difference" between the parties, and could not now be entertained. I cannot assent to that view. I think it is clear that, by section 3 of the Telegraph Act of 1878, "the authority by whom the difference is to

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be determined," be it the sheriff or this Commission, may give their consent "either unconditionally or subject to such pecuniary or other terms, conditions, and stipulations as they may think just." Nor do I think that the word "pecuniary" can be held applicable only to the case of railway or canal proprietors or lessees. But I do not think that there are materials before us which would enable us to fix any pecuniary terms as obviously just. The terms suggested in the negotiations of 1897 were made with reference to a much larger, and in many respects quite different, scheme from that which is now proposed. It is impossible to find in these negotiations any guide to a payment which could be justly imposed for the use of the limited number of streets as proposed in the notice. I am therefore of opinion that the sheriff was right in giving his consent unconditionally, and I propose that we should follow the same course.

The Corporation of Glasgow appealed against this decision.

Shaw, Q.C. (Craigie with him) for the appellants.

This is an appeal on a question of law. Lord Stormonth-Darling said that the corporation had no right to attach any such condition to their consent; but it was within their rights to attach any legal condition under the Telegraph Acts. This precluded the Commissioners from considering whether the conditions were reasonable or not.

In the *North-Eastern Ry. Co. v. North British Ry. Co.* ⁽¹⁾, it was held that if it appears from the judgment that the order proceeded on a wrong assumption of law, there was an appeal to this Court.

The Commissioners have not exercised their discretionary power; they decided that they were not entitled to consider whether the condition was reasonable or unreasonable, but that the corporation had not the right to put in the condition at all, on grounds of public policy. Neither the question of administration nor the merits were approached, because the Commis-

⁽¹⁾ *Ante*, p. 82; 25 *Rettie*, 333.

sioners held themselves foreclosed by a view of the legal right of the corporation, which view, if not negatived, was sufficient for all the purposes of the judgment. If the Commissioners may insist on pecuniary conditions, under section 3 of the Telegraph Act, 1878, it would be a very extraordinary thing if those in whom the roads are vested by statute could not do so.

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The *Solicitor-General* (*Dickson, Q.C.*), and *Johnston, Q.C.* (*Fleming* with them), for the Postmaster-General.

An appeal does not lie; the Railway and Canal Traffic Act, 1888, had reference to railways and canals, not to telegraphs, and section 17 of that Act does not apply at all. Section 8 simply transferred to the new Commission the absolute discretion which the "Railway Commissioners" had under the Telegraph Act of 1878; the latter were merely an administrative body, and could only reach the Courts by stating a case.

In *Strain v. Strain* ⁽¹⁾, an appeal from the sheriff's discretion as to the granting of a warrant in aliment cases was dismissed.

No question of law is raised which the Court can dispose of and on which the Commissioners have proceeded, rightly or wrongly. The Commissioners were considering the "reasonableness" of the consent throughout.

THE LORD PRESIDENT (Right Hon. J. B. Balfour): It may be a question whether the appeal from the Commissioners to a superior Court of Appeal, allowed by section seventeen of the Railway and Canal Traffic Act, 1888, applies to cases arising under the Telegraph Acts; but, assuming that it does, I am of opinion that the appeal is incompetent, because it is not upon a question of law, but of the reasonableness or unreasonableness of the conditions which the corporation seek to have attached to the consent, a matter not depending upon law, but upon fact and opinion upon fact.

It was contended on behalf of the corporation that the question is one of law, because Lord Stormonth-Darling, the *ex officio* Commissioner, in delivering the judgment of the Commissioners, expressed the opinion that the corporation "had no

(1) 13 *Rettie*, 1029.

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right to clog their consent with the condition" above mentioned, and were "not entitled" to attach that condition to their consent.

It does not, however, appear to me that, in using the words "had no right" and "were not entitled," his Lordship intended to decide, or did decide, any question of legal right, or to indicate that any question of legal right was raised for decision. I think that he only meant to say that the corporation had no right, and were not entitled to prevail, in insisting on the condition being annexed to the consent, because it (the condition) was unreasonable. In a similar case⁽¹⁾, between the Postmaster-General and the Corporation of London, Mr. Justice Wright, the English *ex officio* Commissioner, in delivering the opinion of the Commission, said: "I think that we ought to hold that the condition sought to be imposed is not a reasonable one, and not one that ought to be sanctioned by the Court"; and it appears to me that Lord Stormonth-Darling intended in the present case to express the same view.

The best test, however, of what the Commissioners decided is the formal order which they made, and it is, "that the said condition ought not to be attached to the consent of the corporation." This does not involve any statement that either the corporation, or the sheriff, or the Commissioners, had no power to attach the condition, but merely that the condition was unreasonable, and therefore ought not to be attached.

I therefore consider that the question brought before us by this appeal is not one of law, and consequently that we have no jurisdiction to entertain it.

LORD KINNEAR: I concur.

LORD ADAM: I concur.

[Solicitor for the Postmaster-General: *J. S. Pitman* for *Sir Robert Hunter*.

Solicitors for the Corporation of Glasgow: *Campbell and Smith*, Edinburgh.]

⁽¹⁾ *Ante*, p. 234.

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v.

CORPORATION OF EDINBURGH ⁽¹⁾.

Telephone Wires—Ownership of “solum” by Road Authority—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 13—Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 5.

The powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, are powers of construction, and a licence granted by him to the National Telephone company to use lines when constructed is not a licence to exercise powers conferred on the Postmaster-General by the Telegraph Acts of 1863 or 1878; and, consequently, in such a case, section 5 of the Telegraph Act, 1892, has no application.

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October 31,
December 5,
1899.

Section 13 of the Telegraph Act, 1863, only requires the consent of the landowner (to the laying of telegraph wires) in addition to the consent of the body having control of the street, where such landowner is liable, *quod* landowner, for the repair of the street, and where the landowner and the body having such control are separate persons.

The fact of a corporation having the ownership of the *solum* through which the wires are to be laid, affords no reason for annexing pecuniary terms to their consent, inasmuch as the corporation is a public body, and the Postmaster-General must be held to be acting in the public interest.

THIS was an application under section 4 of the Telegraph Act, 1878.

The Postmaster-General applied for the consent of the Edinburgh Corporation to the laying of certain wires under the streets of the city, which it was admitted would be used by the subscribers of the National Telephone company as junction wires from the various call offices to the trunk wires at the Post Office, Edinburgh. This was to be done under an agreement between the Post Office and the National Telephone company,

⁽¹⁾ Before Lord STORMONT-DARLING and Commissioners Sir FREDERICK PREL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

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and would be for the benefit of both parties, the Post Office taking a rent for the wires and also a percentage of their earnings—and further, obtaining increased profits on their own trunk lines owing to these junction lines.

The Corporation of Edinburgh objected to the decision of the sheriff (to whom the matter was referred in accordance with the procedure laid down by the Telegraph Acts) on the following grounds :—

1. That the Postmaster-General was acting on behalf of his licensee the National Telephone company, and that consequently the corporation had an absolute veto under section 5 of the Telegraph Act, 1892 (as modified by section 10 of the same Act).
2. That the corporation being the owners of certain bridges, which they had built on their own soil, and which were repaired by them not as a road authority—the proposal to carry the wires over such bridges required the consent of the corporation as landowners bound to repair under section 13 of the Telegraph Act, 1863.
3. That the corporation were the owners of the “*solum*” of the streets in question, which was a valuable right, and that they were entitled to a substantial way-leave, or else to a rent for the use of the wires.

The Dean of Faculty (Asher, Q.C.), (Cooper with him), for the Corporation of Edinburgh.

The junction wires will be exclusively under the administration of the National Telephone company. The Post Office will use these wires under the Telegraph Acts, and therefore the telephone company, using them as a licensee, will be exercising powers conferred on the Post Office by those Acts.

By the Telegraph Act of 1863, a “road” includes a bridge; therefore the bridges here are part of the road, and they have to be maintained by the corporation as owners, and therefore nothing can be laid upon them without their consent as owners liable to repair by section 13 of that Act.

Section 7 of the Telegraph Act, 1863, gives the owner of the soil a right to compensation, and it is only reasonable that this

should take the form of the corporation sharing in the profits of the Postmaster-General arising from these wires.

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The Lord Advocate (Graham Murray, Q.C.), and the Solicitor-General (Dickson, Q.C.), (Pitman with them), for the Postmaster-General.

The Telegraph Acts of 1863 and 1878 are constructive Acts, the working Act being that of 1869. The Telegraph Act of 1892 does not sweep away the powers of the Post Office under the Acts of 1863 and 1878.

The appeal given to the Railway Commission by the Act of 1878 applies to a consent under section 13, as well as under section 9, of the Act of 1863. The consent asked is that of the road authority, the owner is given compensation under section 7 of the Act of 1863. Any pecuniary condition to be imposed is limited to any claim *quâ* road authorities.

The judgment of the Court was delivered by Lord Stormonth-Darling.

LORD STORMONTH-DARLING: This case, I think, is substantially ruled by our decision of 20th July last, in the case between the Postmaster-General and the Corporation of Glasgow ⁽¹⁾.

At the first hearing of the case, certain difficulties were raised by the present appellants as to the physical possibility of laying wires in the lines proposed by the Postmaster-General; and, in consequence, an adjournment was granted. But these difficulties have now been entirely overcome.

I do not propose to repeat the reasons which led us to our conclusion in the *Glasgow Case*. But I will shortly notice two points:—

- (1.) An argument on the Telegraph Act, 1892, which, although stated in the *Glasgow Case*, was more urgently pressed by the present appellants; and
- (2.) A supposed distinction between the two cases arising out of the fact that the Corporation of Edinburgh are not merely the body having control of the streets, but are the owners of the *solum*.

⁽¹⁾ *Ante*, p. 238.

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First, as to the Act of 1892, it is said that, by the combined effect of sections 5 and 10, a company or person licensed by the Postmaster-General to exercise the powers conferred on him by the Telegraph Acts, 1863 and 1878, cannot exercise these powers in a Scottish burgh without the consent of the burgh road authority, which consent is not open to review. The answer to that argument is, that the powers conferred on the Postmaster-General by the Acts of 1863 and 1878 are powers of construction, and that he has not in the present case licensed any company or person to exercise these powers. He is proposing to do the work of construction himself, and his licence to the National Telephone company to use some of the lines when constructed, is not a licence granted under either the Act of 1863 or the Act of 1878, but under another statute. It seems to me, therefore, that section 5 of the Act of 1892 has no application.

Second, as to the ownership of the streets by the Corporation of Edinburgh, it is necessary to distinguish between their character as owners and their character as the body having control of the streets. For it is only in the latter capacity that their consent is required under the Act of 1863. No doubt, under section 13 of that Act, the consent of the landowner is required in addition to the consent of the body having control, but only where such landowner is liable for the repair of the street. And, as I read section 112 of the Edinburgh Municipal Act of 1879, the Corporation of Edinburgh is liable for repair of the streets which are here in question, not as owners, but because, by that section, these streets are vested in them, and they have "the sole charge and superintendence of the same." The same observation applies even to the North Bridge, because, by the special Act under which it was reconstructed (57 & 58 Vict. c. 151, s. 28) the provisions of the Municipal Act of 1879 are made to apply to it. But, really, it is of very little importance whether the corporation are liable to repair these streets and bridges in the one character or in the other, because I am satisfied that section 13 of the Telegraph Act of 1863 requires the consent of the owner, in addition to the consent of the body having control, only where these are separate

persons. Accordingly, I do not think that the fact of the corporation being owners at all affects the question which we have to decide. In particular, it does not seem to us to afford any reason for annexing pecuniary terms to the consent which we think ought to be given to the operations of the Postmaster-General. The corporation are a public body, and the Postmaster-General must be held to be acting in the public interest. We shall, therefore, give consent to the proposal of the Postmaster-General, as the sheriff did, without conditions.

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[Solicitor for the Postmaster-General: *J. S. Pitman*, Edinburgh, for *Sir Robert Hunter*.

Solicitor for the Corporation of Edinburgh: *T. Hunter*, Edinburgh.]

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v.

CALEDONIAN RAILWAY COMPANY AND NORTH BRITISH RAILWAY
COMPANY ⁽¹⁾.

Passenger Station Accommodation—Rebuilding Bridge carrying Street over Railway—Alterations applied for not within Railway Company's own power—The Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), s. 16—The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2.

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Section 16 of the Scotch Railway Clauses Act, 1845 (8 & 9 Vict. c. 33), gives power to a railway company (subject to restrictions in its special Act) to construct bridges over railroads, and from time to time to alter, repair or discontinue them and substitute others in their stead, and to do all other acts necessary for making, maintaining, altering or repairing, and using the railway.

Upon a complaint by the Town Council of Arbroath of the want of facilities for passenger traffic at the station at Arbroath, it was admitted that the rebuilding of a bridge on which the booking offices were erected and which carried one of the town streets over the railway, was essential to any material alteration and improvement of the station. This bridge was originally constructed by the railway company under their special Act, but the street passing over the bridge was vested in the municipal authorities of Arbroath.

Held, that while section 16 of the Railways Clauses Consolidation (Scotland) Act, 1845, gives railway companies power to alter works of their own, it does not apply to works which have been dedicated to a purpose other than railway purposes, *e.g.*, a street which is vested in the municipal authorities.

Held, further, that as the accommodation works which the applicants asked for could not be carried out except with the consent or authority of someone other than the railway companies themselves, the works applied for were not within the railway companies' own powers, and that therefore the railway companies had not violated their statutory duty under section 2 of the Railway and Canal Traffic Act, 1854.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854. The Corporation of Arbroath com-

⁽¹⁾ Before Lord TRAYNER and Commissioners Sir FREDERICK PEEL and Viscount COBBHAM, sitting at the Parliament House, Edinburgh.

plained that the Caledonian and North British railway companies, who were the owners of the Dundee and Arbroath joint line, had neglected and refused to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic using the Arbroath station. Specific complaints were made as to the length and width of the platforms and as to the ticket office accommodation, and also as to the waiting rooms and lavatory accommodation.

The respondent companies, in their answer, after denying the specific causes of complaint, stated, that to accomplish the improvements which the applicants desired, the railway companies required statutory powers; and that the railway companies had deposited a Bill in Parliament for the building of a practically new station, which had been agreed to by the applicants, but that the latter had since withdrawn their consent to the Bill. Powers were sought by this Bill to replace the stone bridge on which the booking offices were built, and over which the road was carried, by a new bridge with iron girders, and also to close a level crossing. It was this latter alteration which the applicants objected to, except on their own terms. In consequence of the opposition of the applicants, the Bill, which was otherwise unopposed, was withdrawn.

At the conclusion of the evidence on behalf of the applicants, the Court requested counsel to argue the question whether, having regard to the decision in the *Hastings Case* ⁽¹⁾, what the applicants asked for was within the powers of the railway companies, and therefore within the jurisdiction of the Court to order.

Solicitor-General (Dickson, Q.C.) (Clyde with him) for the applicants.

It follows from the judgment in the *Hastings Case* ⁽¹⁾ that if this Court is satisfied that the necessary facilities do not exist, and although they may not in the first instance be entitled to prescribe the precise thing to be done, at any rate, they can say

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⁽¹⁾ *Ante*, Vol. III. 464.

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that there is a failure on the part of the railway company in discharging their statutory duty, and that such failure **must** be remedied. The Court in such a case has generally indicated that in their opinion there is a necessity for facilities.

[SIR FREDERICK PEEL: The Court must be satisfied **that** there is a way in which the facilities can be given.]

The present case differs from the *Hastings Case*, because in that case it was impossible to enlarge the bridge without the railway company acquiring further ground. In the present case the railway company do not require to interfere with anyone's property but their own. It is a bridge constructed by the railway company on their own land, and maintained by them, the community only having a right of passage across it. The provision of suitable waiting rooms and lavatory accommodation and booking office accommodation are matters which can be remedied without touching the bridge at all.

The Dean of Faculty (Asher, Q.C.) (Balfour, Q.C., and Cooper with him) for the railway companies.

Where a railway runs over its own bridge, it can do what it likes with it. Where it substitutes a bridge carrying a street for the street which was there before, it is bound to maintain such bridge, and keep up the roadway; but this does not give the railway company the right to alter that bridge or block the street, which still remains a street available to the town for all municipal purposes (*e. g.*, water, gas, &c.)

As in the *Hastings Case* ⁽¹⁾, the consent of someone outside is here necessary. Not trying to get that consent (and the accompanying power) cannot be a contravention of the statute.

In the *Hastings Case* ⁽¹⁾, where the consent had been obtained by agreement, the Court held that a power so obtained was not a power belonging to a company under the statute, so as to make them contraveners of the statute by not doing a thing which they only got power to do under that agreement.

⁽¹⁾ *Ante*, Vol. III. 464.

LORD TRAYNER: We invited discussion upon this question of law because it seemed to us that if a certain view of it was entertained it put an end to the case, and that neither further evidence nor argument would be necessary.

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The Commissioners are of opinion that upon the case, as presented by the applicants themselves, they cannot succeed in the present application. Prior to 1895 there were negotiations between the railway companies, the owners of this station, and the municipal authorities of Arbroath, with reference to improvements which, it was suggested, might be made upon the station itself; but it is unnecessary in dealing with this case to go beyond the negotiations which took place in 1895. In that year the railway companies submitted to the town authorities a plan of proposed alterations to the station at Arbroath which they were prepared to carry out. But it was a necessary part—an essential part—of their plan that two things should be done, namely, the alteration of the bridge over Keptie Street, and the closing of the street called Spink Street. On a consideration of the plan which was exhibited to them, and after conferences on the subject more than once among themselves, the municipal authorities came to be of opinion that that plan should be adopted and to that plan they gave their consent. Not an unqualified consent, as I shall observe immediately, but they gave their consent to the two things being done which were essential features of the companies' proposal. They consented to the bridge over Keptie Street being altered, and they consented to the street called Spink Street being closed. Now I have said that they did not give an unqualified consent, because they said that, "subject to the adjustment of details," they consented to these alterations. It is perfectly obvious to anyone who was able to understand a plan, and to understand the correspondence that took place with reference to the plan, that the removal and alteration of Keptie Street bridge, and the closing up of Spink Street, were not details. It is quite true that some of the gentlemen who were examined yesterday said that they had regarded these as matters of detail to be afterwards adjusted; but they practically admitted that in this view they were probably wrong, and accounted for their error

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by saying that they had been misled by the word "details," the meaning of which they had not entirely apprehended. Of course these gentlemen were speaking in perfectly good faith; and the contrary is not even suggested. But I repeat it was not a matter of detail, but a matter of the essence of the companies' proposals that the Keptie Street bridge should be rebuilt, and that Spink Street should be closed. I may say, just in a word, that the reason for making these two things essential was, that without the alteration of Keptie Street bridge it was impossible to give that accommodation below it for platforms which was much desired by the municipal authorities, and which appeared to be very desirable in itself; while, as regards Spink Street, it was essential that it should be closed, because unless that was done the railway companies could not get that accommodation for their goods traffic, without which it was impossible for them, within the limits of the space which they possessed, to give the desired, and the desirable, alterations with regard to station accommodation. Now, if these two things are essential, and these two things are not within the power of the companies—I mean, if these two things are essential to the carrying out of these accommodation works which the petitioners desire, and these cannot be carried out unless with the consent or authority of somebody other than the railway companies themselves—then it appears to me to be clear that the railway companies are not in violation of their statutory obligation in not having afforded the accommodation sought. The witness who was examined first yesterday on behalf of the applicants stated, that without the alteration of Keptie Street bridge, it was impossible to make any real improvement upon Arbroath station. No doubt there might be an adjustment and alteration of waiting-room accommodation, and some other things of that kind, without interfering with the bridge. But it is not for this Court to direct the railway companies at what particular part of their station they shall have a cloak room, or in what particular part of the station a waiting room or lavatory. But it was plain, upon Mr. Crouch's evidence, that there was no hope of making this station such as the municipal authorities of Arbroath (and such as other people)

would desire to see it, without the taking down of Keptie Street bridge, and although Mr. Crouch was not so clear about that, without the addition also of the ground which would be afforded by the closing up of Spink Street. Now, if that is the state of the fact upon the petitioners' own evidence, I take it, as I have already indicated, to be certain that the railway companies are not violating any of their statutory duties by failing to increase and alter the station accommodation in the way which has been desired. On the matter of law, therefore, I am of opinion that the railway companies are not in violation of any statutory duty, because the works which they are asked to carry out, and which we are asked practically to order to be carried out, are not within their own power.

I should not have thought it necessary to add more to what I have said had it not been for the contention of the Solicitor-General, upon the Railway Clauses Act, that the railway companies have power at their own hand to interfere with Keptie Street bridge without any consent. I think that is not so. No doubt the railway companies under the Railway Clauses Act have power to alter works of their own; but I do not think they have power to alter or substitute works that they have made and dedicated to a different purpose than their own—that is to say, a different purpose than railway purposes. The street over Keptie Street bridge is just a part of the streets of the burgh; and I should be slow to hold that the railway company at its own hand had the right to break down that street and deprive the citizens of the right they have of passage by it from one part of the town to another. The railway companies, with regard to works which are their own, are entitled under the statute to alter them and substitute others for them; but they cannot by doing so infringe rights vested in other people. The street passing over Keptie Street bridge is as much vested in the municipal authorities as any other street in Arbroath.

If the application fails upon that ground, that is enough to dispose of the case. But I think it right to go a little further. I am of opinion, upon the evidence submitted to us, that the complainers have failed to establish the statement of fact which they set forth in the second article of their application. They

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say the defendants have for a long time neglected and refused to afford, and still refuse to afford, reasonable facilities for receiving, forwarding and delivering the passenger traffic at Arbroath station. I think that statement has not been proved; and for my own part I am prepared to negative the statement, because I think the railway companies have never refused to afford any facility for the traffic, passenger and goods, which it was within their power to afford at Arbroath station. At the same time it is impossible to conceal from oneself that this station, which was built at an early period in the history of railways, is not a station which in all respects conforms to modern requirements, and I should think the railway companies would find it to be not only for their own interest but for their own convenience to endeavour, as far as they possibly can, to make the station a better one than it is. I should like to add further, that as in 1895 or 1896 the town council of that time agreed to the closing up of Spink Street, and thought that was not too great a price to pay for the additional accommodation which the railway companies were otherwise disposed to give them if Spink Street was closed, that the parties might again reconsider their position, and that on the one hand the town might consider whether Spink Street might not now be closed up as they agreed in 1896 it should, and that upon that being done the railway companies should not now proceed to carry out these alterations and amendments which according to their plan of 1896 they were willing to perform. I think the parties might consult—in the case of the railway companies their own advantage, and in the case of the town council of Arbroath the public's advantage—if they would now try to adjust the same terms between them as were proposed in 1896.

In the meantime I am of opinion that both in fact and law the applicants' case has failed, and that the application ought to be dismissed.

SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitors for the applicants: *Durnford & Co.*, agents for *W. K. Macdonald*, Arbroath.

Solicitors for the railway companies: *William Robertson & Co.*, agents for *Thos. Thornton, Son & Co.*, Dundee.]

CALEDONIAN RAILWAY COMPANY

v.

NORTH BRITISH RAILWAY COMPANY ⁽¹⁾.

*Running Powers—Terms for exercise of—Allowance for Working Expenses—
General Rule—Regulation of Railways Act, 1873 (36 & 37 Vict.
c. 48), s. 8.*

The ordinary terms granted by the Railway Commissioners on which running powers may be exercised are 75 per cent. of the rate, after the deduction of terminals, to the owning company, and 25 per cent. of the rate to the company exercising the running powers. July 6, 1898.

This now amounts to a rule, which will only be departed from under special circumstances.

By an Act of Parliament the Caledonian railway company were given running powers over a line of the North British railway company to B., a distance of 13 miles, on such terms and conditions as should be agreed upon between these railway companies (subject to a provision that the rates charged by the Caledonian company to B. should not exceed those charged by them for similar traffic from the same places to G.), or as, failing agreement, an arbiter might determine.

Such arbiter was empowered, "in fixing such terms and conditions, to have regard to the obligations imposed on the Caledonian company with respect to rates."

The Caledonian company proposed certain fixed tolls for the exercise of their running powers, viz.: Passengers 2*d.* each, goods 4*d.* per ton, and minerals, including pig-iron, 3*d.* per ton; this being the arrangement between the two companies (by agreement) on the line to G., where the tolls in force, for a distance of under three miles, were in each case less by 1*d.* than the above-mentioned proposed tolls.

Held, that the proposed tolls were inadequate, and that the running powers should be exercised on the ordinary terms.

THIS was an application under section 8 of the Regulation of Railways Act, 1873, and section 15 of the Railway and Canal Traffic Act, 1888.

⁽¹⁾ Before Lord TRAYNER and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

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By the Borrowstounness Town Improvement and Harbour Act, 1897, s. 24, running powers and facilities over the North British railway company's lines, between Larbert and Carmuir (East) junctions respectively, on the one hand, and the harbour and docks of Borrowstounness, including the branch to Bridge-ness, on the other hand, are conferred on the Caledonian railway company subject to the following provision:—

“Provided always, that the Caledonian company in respect of all descriptions of traffic conveyed by them in the exercise of the running powers conferred by this Act, to or from places on the Caledonian railway and beyond, from time to time shall not charge rates exceeding the rates for similar traffic from or to the Grangemouth branch railway of the Caledonian company, the harbour and dock at Grangemouth, and the harbour of South Alloa, to or from the same places.”

By section 25 of the same Act, the terms and conditions of the exercise of these powers were, failing agreement, to be determined by an arbiter appointed by the Board of Trade, with the following proviso:—

“Provided always, that the arbiter in fixing such terms and conditions may have regard to the obligations imposed on the Caledonian company by the immediately preceding section with respect to rates.”

The general manager of the Caledonian company made the following proposition to the North British company:—

“Having regard to the provisions of section 24, providing for the rates to be charged by my company in the exercise of their running powers, not exceeding the rates from or to the Grangemouth branch railway to or from the harbour and dock at Grangemouth and the harbour at South Alloa, my company are of opinion that the payments by them to your company should be a fixed nett toll as in the case of the Grangemouth traffic of the two companies, together with their proportion of interest at 7 per centum on the cost of works as at Grangemouth, and in that case I beg to propose the following tolls:—

“1. Passengers, 2*d.* each.

“2. Goods, 4*d.* per ton.

“3. Minerals, including pig-iron, 3*d.* per ton.”

On the Grangemouth line, a distance of under three miles, the rates then in force were—for passengers, 1*d.* each ; for goods, 3*d.* per ton ; for minerals and pig-iron, 2*d.* per ton.

The North British railway company contended in their answer that, considering the distance to be run over by the Caledonian company was nearly thirteen miles, payment by fixed tolls was unfair to them, and they could not agree to it for the exercise of what were strictly compulsory running powers. They stated that the length of the Grangemouth branch railway from the North British railway to Grangemouth, over which the North British railway got running powers in 1867, was under three miles, and that the tolls were fixed in 1867 by agreement between the two companies, in return for running powers granted to the Caledonian railway over the North British railway at the same date over a similar distance, at the same amount in each case.

They further stated that, prior to the passing of the Borrowstounness Town Improvement and Harbour Act, 1897, the Caledonian company already had, under the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act, 1865, running powers over the North British railway from Larbert junction to Bo'ness high junction, a distance of 7 miles 42 chains, on the terms and conditions set forth in the Act of 1865, namely, that the running company should receive 25 per cent. of the mileage receipts on account of working expenses. The only part of the North British railways over which running powers were for the first time conferred on the Caledonian company by the Act of 1897, was the branch from Bo'ness high junction to Bridgeness, a distance of 5 miles 34 chains.

The North British railway company contended that the aforementioned Act of 1865 set forth the usual terms for the exercise of running powers in Scotland, namely, that the running company shall receive on account of working expenses 25 per cent. of the mileage proportion of the rates and fares applicable to the owning company's line.

The Caledonian company in their reply stated that the terms of the Act of 1865, as to the Caledonian company's running powers from Larbert junction to Bo'ness high junction, had

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been superseded by an agreement conferred by the Caledonian Railway (No. 1) Act, 1884, which imposed nett tolls.

They denied that the terms of the Act of 1865 were applicable in general, or to this particular case.

The Solicitor-General (Dickson, Q.C.) (Clyde with him), for the applicants.

The Caledonian railway company got running powers over the North British railway to Bo'ness in consideration of the North British getting access to the new dock which the Caledonian company were authorized to construct at Grangemouth. Parliament intended the two companies to be on the same footing as regards Bo'ness and Grangemouth. There is a distance of from ten to four miles as regards Bo'ness for which the Caledonian company are to get no charge for mileage—section 25 provides for this being taken into consideration. The Commissioners of Bo'ness stated in their Act that it was expedient for the Caledonian company to come into Bo'ness; on the North British company's terms the running powers would never be exercised, and Bo'ness would remain with one railway company.

The Dean of Faculty (Asher, Q.C.) (Balfour, Q.C., and Grierson with him), for the respondents.

The terms of section 25 are "empowering" and not "compelling." If the running powers have been accepted under too onerous a condition, why should the whole burden come on the owning company, who resisted the granting of them?

The principle of allowing 25 per cent. for working expenses distributes the loss over both companies equally. The Caledonian company can stop exercising their powers whenever they like. The Grangemouth rate has no relevancy—it arose by agreement and on mutual consideration; it has been reduced by threatened competition. This reduced rate is taken as a basis for exercising compulsory running powers; seeing the mileage, the proposed rates, even on that basis, are inequitable.

The Grangemouth rate not being in the least binding as a standard to follow, the ordinary rule should be adopted in this case.

The judgment of the Court was delivered by Lord Trayner.

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LORD TRAYNER: We have before us an application on the part of the Caledonian railway company to fix the terms and conditions on which they shall exercise the running powers conferred upon them by the Bo'ness Town and Improvement Harbour Act, 1897, over the North British line from Larbert to Bo'ness. That is a question which the Court has had to consider more than once, and it appears that for many years past there has been a practice, certainly in Scotland if not elsewhere, that in these circumstances the ordinary mode of adjusting the conditions on which running powers shall be exercised is by giving 75 per cent. of the rate to the owning company and 25 per cent. of the rate to the company exercising the running powers. That has been so often adopted, and with legislative sanction, that it really amounts to a rule; and the question, therefore, in this case is, whether the Caledonian company have shown that the present application is attended with any circumstances which could in fairness take it out of that general rule and induce the Court to fix a different rate in the particular case with which we are dealing.

The Caledonian company have proposed that, instead of following what I have called the usual rule, they should be allowed to exercise their running powers from Larbert to Bo'ness upon certain fixed tolls. I must say that the tolls proposed seem to me altogether inadequate, and that the proposal of the Caledonian railway company cannot be given effect to.

But referring to the proposal, on the other hand, of the North British company, I have now to consider whether the Caledonian company have shown any reason why that proposal, which, as I have mentioned, is a proposal in conformity with the prevailing rule, should on this occasion be departed from. I am unable to see any circumstances in the case as presented to us which would justify us in departing from that rule. We have fully before us, not only the terms of the statute which have been referred to by the Solicitor-General, but the whole circumstances of the case; and in these circumstances I am distinctly of opinion that we should now fix that the sum to be

1898. paid by the Caledonian railway company to the North British
 CALEDONIAN RY. Co. for the exercise of these running powers is 75 per cent. of the
 v. total rate. It was stated to us yesterday that fixing such a rate
 NORTH as that, or such a proportion as that, to be paid by the Cale-
 BRITISH donian company to the North British company would result in
 RY. Co. the Caledonian company being practically debarred from exer-
 Lord Trayner. cising their running powers altogether. Upon that matter I
 am not at all sure of that, and I venture to think that Mr.
 Patrick took a somewhat pessimistic view of the case when he
 suggested that that would be the result. The Caledonian com-
 pany had their own ends in view when they obtained the
 Bill which gave them running powers into Bo'ness. I have no
 doubt whatever that the Caledonian company were quite well
 advised in proceeding to obtain these running powers, and that
 they had before them all the reasonable considerations which
 would influence them in seeking to obtain those powers, and
 that they will now, notwithstanding our judgment, make that
 use of the running powers which they have, and gain that
 advantage from it which they anticipated when they sought the
 powers from Parliament. I think there are other circum-
 stances in the case which go very much to strengthen the view
 which I am expressing, but which it is not necessary, in deciding
 the case, to dilate upon.

On the whole matter, I am of opinion that we should fix that
 the running powers shall be exercised by the Caledonian com-
 pany over the North British company's line from Larbert to
 Bo'ness on the terms which I have stated—namely, that the
 Caledonian company shall pay to the North British company
 75 per cent. of the rate, after deduction of terminals, and shall
 retain 25 per cent. for the working expenses.

The Commissioners issued an order, the operative portion of
 which was as follows :—“This Court doth decide and determine
 the terms for the exercise by the Caledonian company of the
 running powers conferred upon them by the said Act as follows:
 The amount to be paid by that company to the North British
 company in respect of running over and using so much of the
 railways of the North British company as lies between the

junctions of the railways of that company with the railway of the Caledonian company at Larbert and Carmuir (East) junctions respectively, on the one hand, and the harbour and docks of Borrowstounness, including the branch to Bridgeness, on the other hand, together with the stations, works, appliances, and conveniences above mentioned, shall be at the rate of £75 per cent. of the mileage receipts from the traffic so conveyed by the Caledonian company over such portions of the North British railway, after deducting the Government duties in respect of passengers and the usual terminals payable in respect of such traffic according to the regulations of the Railway Clearing House in force for the time being, and such terminals upon coal and lime and other articles not regulated by the Clearing House as may be agreed upon, or, in case of difference, fixed by arbitration, which shall belong and be paid to the companies respectively entitled thereto. And further, that £25 per cent. of the amount remaining after deducting the said duties and terminals aforesaid shall be allowed to the Caledonian company on account of their working expenses in relation to such traffic."

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[Solicitors for the applicants: *Grahames, Currey and Spens*, for *H. B. Neave*, Glasgow.]

Solicitors for the respondents: *Loch & Co.*, for *J. Watson*, Edinburgh.]

GREAT NORTHERN RAILWAY COMPANY

v.

GREAT CENTRAL RAILWAY COMPANY ⁽¹⁾.

Facilities Clause—Diversion of Traffic—Interim Injunction—Powers granted under old Acts not exercised—Circumstances changed—Jurisdiction—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 9.

April 28,
June 1, 2, 15,
1899.

Article 12 of an agreement made between the Great Northern railway company and the Manchester, Sheffield and Lincolnshire railway company, and dated 30th January, 1892, and confirmed by the Manchester, Sheffield and Lincolnshire Railway (Extension to London, &c.) Act, 1893, provided as follows:—

“On and from the passing of the bill, and whether the running powers provided for by this agreement are exercised or not, there shall be a complete system of through booking and through rates and fares between the systems of the two companies by all reasonable and convenient routes . . . and each company shall conduct the through traffic of the other company in good faith and by through trains, and shall afford to the other company all such reasonable facilities and accommodation as regards traffic of all kinds as is usual between friendly railway companies for the convenient conduct and exchange of traffic passing or destined to pass between the respective systems of the two companies.”

The respondents having completed their line to London, certain fish traffic was handed to them at Grimsby for conveyance to London “*via* Great Northern railway.” This had hitherto been so forwarded, but the respondents now conveyed it by their own route to London and delivered it themselves. On an application for an interim injunction enjoining the Great Central company to desist from diverting from the Great Northern company the fish traffic from Grimsby to London which is consigned by the Great Northern railway,

Held, that the route being *prima facie* a reasonable one, the Great Northern railway company would have *prima facie* the right of requiring traffic to be carried by it on reasonable terms; there being also *prima facie* a contract to that effect, and as an interim injunction would not harm the respondents (provided accounts were kept), and the absence of it might seriously damage the applicants, an interim injunction should be granted.

The Great Northern Railway (Communication with the Manchester, Sheffield and Lincolnshire Railway) Act, 1851, s. 14, enacted:—

“That the Great Northern railway company shall have the right of access at all reasonable and proper times to, and accommodation at, the tidal basin at

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PERL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

Great Grimsby for the fish traffic, and likewise access to and accommodation at the docks for the goods traffic, including the right to rent a piece of land for warehouses thereat, upon such sites and upon such terms and conditions, and subject to such regulations as may be agreed upon by the engineers of the two companies, and in the event of a difference between them as may be settled by arbitration in the manner hereinafter provided."

Section 15 of the same Act provided for arbitration under the Companies Clauses Act, 1845.

The West Riding and Grimsby Railway (Transfer) Act, 1866, s. 31, enacted that:—

"It shall be lawful for the Great Northern railway company to run over and use with their engines, carriages, and servants the Sheffield, South Yorkshire, and Trent, Ancholme and Grimsby railways situate between Barnby Don and Grimsby, including the docks at Grimsby and the railways leading thereto and the works connected therewith, and to use in common with the said Sheffield and South Yorkshire, and Trent, Ancholme and Grimsby railway companies the several sidings, stations, turntables, docks and other conveniences and appurtenances to the said several lines of railway appertaining or belonging."

The applicants applied, under section 9 of the Railway and Canal Traffic Act, 1888, for an order enforcing the performance of the obligations imposed by the above-mentioned sections; also for an order, under section 8 of the Regulation of Railways Act, 1873, for determining the sites, terms, conditions and regulations upon which the rights conferred upon the applicants by section 14 of the Act of 1851 are to be exercised in lieu of arbitration. It was proved that the docks had been completely changed under powers given to the Manchester, Sheffield and Lincolnshire railway company by an Act of 1849, vesting the docks in them, and that the "tidal basin" no longer existed.

Held, by the Commissioners, that they had jurisdiction to deal with the above-mentioned matters under section 9, sub-section (a) of the Railway and Canal Traffic Act, 1888; and, with regard to the warehouse site, under sub-section (c) of the same section, where the term "individual" means "any legal person not the general public."

Quere whether, as regards section 14 of the Act of 1851, it is a condition precedent to the Commissioners having jurisdiction that the engineers of the two companies should have considered the matter and disagreed.

Held, further, that it is not the function of the Court to make abstract declarations which they could not enforce in their entirety; and that before making an effective order, or granting an injunction under the Act of 1851, the applicants must put forward a definite scheme to be considered by the respondents.

That the Great Northern railway company cannot now (1899) be considered in the same position as if they had asserted their rights immediately after the passing of the Act of 1851; and that they must now show that their scheme is reasonably possible.

Held, further, that section 31 of the Act of 1866 gives the applicants the right to run over and use the whole of the railways in the docks and all the appurtenances thereto, as the term "docks" in that section cannot reasonably be considered merely a definition of the *terminus ad quem*, but that the applicants must first show that the exercise of these powers of user can be so regulated as not to interfere with the convenient conduct of the business of the docks.

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THIS was an application under section 9 of the Railway and

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Canal Traffic Act, 1888. The application (so far as material) was as follows:—

“1. The applicants are the lessees of, for 999 years, and work the East Lincolnshire railway between the Great Northern railway at Boston and Great Grimsby. They are also joint owners with the respondents of the West Riding and Grimsby railway, which is connected with the Great Northern railway, and have running powers over the railway of the respondents between Barnby Don and Grimsby docks, which belong to the respondents.

“2. There is a large traffic between Grimsby docks and the applicants' railway, and among other descriptions of traffic a large quantity of fish traffic is received at Grimsby docks destined for London, which has until recently been carried by the applicants over the East Lincolnshire railway.

“3. The respondents, however, now refuse to forward traffic by way of the East Lincolnshire railway, or to allow traffic consigned to London by the applicants' railway to pass by that route. They have not only refused facilities to enable the said traffic to pass over the applicants' route, but they have diverted and are diverting fish traffic which has been consigned by the applicants' route to London, carrying it to London by their own route instead, in violation of their obligation under section 2 of the Railway and Canal Traffic Act, 1854, and contrary to the provisions of article 12 of an agreement made between the applicants and the respondents, and dated 30th January, 1892, and confirmed by the Manchester, Sheffield and Lincolnshire Railway (Extension to London, &c.) Act, 1893, which provided as follows:—On and from the passing of the bill, and whether the running powers provided for by this agreement are exercised or not, there shall be a complete system of through booking and through rates and fares between the systems of the two companies, by all reasonable and convenient routes, including, so far as the two companies or either of them have power, lines worked by either company, or owned jointly by either company with any other company, and each company shall conduct the through traffic of the other company in good faith and by through trains, and shall afford to the

other company all such reasonable facilities and accommodation as regards traffic of all kinds as is usual between friendly railway companies, for the convenient conduct and exchange of traffic passing or destined to pass between the respective systems of the two companies, such through rates and fares shall, failing agreement between the two companies, be settled by arbitration, and shall be the same by all routes between the same points, and except as provided in the last preceding article of this agreement shall be apportioned and divided between the two companies, according to mileage, after deduction of terminals, paid-ons, paid-outs, proportion payable to other companies, and government duty. The apportionment shall, unless otherwise agreed, be made monthly through the clearing house, in accordance with the regulations for the time being in force, and subject to the provisions hereinafter contained with respect to terminals in certain cases, each company shall be entitled to the terminals at their own stations.

"4. By the Great Northern Railway (Communication with the Manchester, Sheffield and Lincolnshire Railway) Act, 1851, s. 14, it was provided as follows:—That the Great Northern railway company shall have the right of access at all reasonable and proper times to, and accommodation at, the tidal basin at Great Grimsby for the fish traffic, and likewise access to and accommodation at the docks for the goods traffic, including a right to rent a piece of land for warehouses thereat upon such sites, and upon such terms and conditions and subject to such regulations as may be agreed upon by the engineers of the two companies, and in the event of a difference between them, as may be settled by arbitration in the manner hereinafter provided.

"In section 15 of the same Act, provision was made for arbitration under the Companies Clauses Act, 1845.

"5. By the West Riding and Grimsby Railway (Transfer) Act, 1866, the undertaking of the West Riding company was vested in the applicants and the respondents jointly, and certain running powers were conferred upon these two companies over part of the respective systems of the other; sections 31 and 33 of the said Act are as follows:—(31) It shall be lawful for the

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Great Northern railway company to run over and use with their engines, carriages and servants the Sheffield, South Yorkshire and Trent, Ancholme and Grimsby railways situate between Barnby Don and Grimsby, including the docks at Grimsby and the railways leading thereto and the works connected therewith, and to use in common with the said Sheffield and South Yorkshire and Trent, Ancholme and Grimsby railway companies the several sidings, stations, turntables, docks and other conveniences and appurtenances to the said several lines of railway appertaining or belonging.

“(33) * * * either the Great Northern company or the Sheffield company may from time to time employ at all or any of the stations and docks on the several undertakings of the companies in this clause mentioned their own clerks and carting agents; and the said respective companies shall as far as possible provide all proper and needful accommodation for such clerks and carting agents at such respective stations and docks, and the terminal shall belong to the company owning the station and docks, who shall pay thereout to the company performing any of the services aforesaid the cost to them of such services:
 * * *

“6. At the time of the passing of the last-mentioned Acts and until recently the applicants and the respondents had no conflicting interests, but were working together to develop traffic in their mutual interest. The applicants have consequently not hitherto had occasion to exercise and have not exercised certain of the powers and rights conferred on them by the said Acts of 1851 and 1866 respectively, but the respondents have recently opened an extension of their railway which gives them access to London by a route independent of the applicants' railway, and have commenced to actively compete with the applicants for London traffic from Grimsby as well as other places.

“7. Under the altered relations which now exist between themselves and the respondents the applicants require to exercise the powers and rights and to make use of the facilities at Grimsby which were conferred upon them by the said Acts of 1851 and 1866 respectively, and requested the respondents to afford the facilities at Grimsby provided for by the said Acts

and to otherwise perform the obligations imposed upon them by the sections of the said Acts hereinbefore referred to.

“The applicants pray for an order—

- (a) Under section 2 of the Railway and Canal Traffic Act, 1854, enjoining the respondents to afford all reasonable facilities for receiving and forwarding fish traffic between Grimsby docks and the applicants' railway, and to desist from diverting such traffic when consigned by the applicants' railway to London;
- (b) Under section 9 of the Railway and Canal Traffic Act, 1888, requiring the respondents to afford the facilities and perform the obligations at Grimsby which are provided for and imposed by the sections of the Acts of Parliament hereinbefore referred to;
- (c) Determining the difference which has arisen under article 12 of the agreement of 1892 herein referred to, and determining the sites, terms, conditions and regulations upon which the rights conferred upon the applicants by section 14 of the said Act of 1851 are to be exercised, and upon which the facilities are to be afforded by the respondents, which they are under an obligation to afford by virtue of that section in lieu of the differences between the applicants and respondents being referred to arbitration, no arbitrator having in any general or special Act been designated by his name or by the name of his office, nor any standing arbitrator appointed under any general or special Act;
- (d) For damages in respect of loss of fish traffic and diversion of fish traffic from Grimsby docks to London.”

The Great Central railway company had refused the applicants the facilities they claimed under the Acts quoted in the application, on the ground that the present docks had had no existence in 1851, and that they themselves had utilized the whole of the dock area, and could give no separate accommodation for another railway company.

All the improvements at Grimsby docks had been carried out

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under the respondents' old Act of 1849, transferring to them the dock undertaking.

At a date previous to the hearing of the case, the applicants applied to the Commissioners for an *interim injunction* "that the Great Central company do desist from diverting from the Great Northern company the fish traffic from Grimsby to London which is consigned by the Great Northern railway."

C. A. Cripps, Q.C., for the Great Northern railway company.

The Great Central railway company now claim the right to carry by their own route fish consigned to salesmen in London, even though it is consigned *via* the Great Northern railway. The Great Northern route is a reasonable route, and there is a rate in existence; and the trader is entitled, when he consigns traffic by a particular route, to have it so carried. The Great Northern company are applying to the Court as arbitrators to decide differences arising under paragraph 12 of the agreement of 1893, granting them facilities for through traffic; this clause was only inserted because of the coming competitive route, in order to preserve the old facilities intact. The Great Central company are not acting as a "friendly railway company," and this agreement entitles the Great Northern company to an *interim injunction*. The Great Northern railway company are suffering extraordinary damage, since if traffic is once diverted, it cannot be recovered; while the Great Central railway company cannot lose anything, as the profits of the traffic can be handed over, provided proper accounts are kept, should the Court afterwards decide in their favour.

C. A. Russell, Q.C., for the Great Central railway company.

Paragraph 12 of the agreement of 1893 was never intended to apply to traffic which could be carried by the one company from its start to its destination, which is not "through traffic"; it only deals with such traffic as must, in order to proceed from its start to its destination, "pass between the respective systems of the companies." The Great Central railway company are following the usual practice between "friendly railway companies." The Great Central company possess a reasonable route of their

own, and afford the trader all reasonable facilities by carrying by that route. If the trader refused to have his traffic sent by that route, the railway company could refuse to carry at all, unless the trader should make out at the trial that their route was not a reasonable one. The Great Northern have no right of complaint, apart from the agreement, which does not apply.

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WRIGHT, J. : What we have to do now, is to consider whether there is such a balance of convenience in favour of doing what the Great Northern company asks us to do, as justifies us in making a temporary order.

Now it seems to me, *primâ facie*, quite plain that on a proper application by a trader at Grimsby he could get an order of the Court requiring the traffic to be carried on reasonable terms by either route. Both of them, *primâ facie*, are proper routes. *Primâ facie*, also, it seems to me that the Great Northern company, on a somewhat different application from this, might have the same right. If those are *primâ facie* rights, as I think they are, they ought to be given effect to under paragraph 12 of the agreement, if they are within the words of that paragraph. It seems to me they are emphatically within the words "destined to pass between the respective systems of the two companies"; and, if so, it is traffic in respect of which each company is required to "conduct the through traffic of the other company in good faith and by through trains, and shall afford to the other company all such reasonable facilities and accommodation as regards traffic of all kinds as is usual between friendly railway companies for the convenient conduct and exchange of traffic" of that kind. I cannot doubt that as between friendly railway companies that accommodation would be given.

Then, if there is a contract to that effect, as I think there is *primâ facie*, that is a strong reason for our being the more willing to interfere by interlocutory injunction than we should be if it were not a matter of contract; and I think we are all clear, upon consideration, that if proper accounts are kept the Great Central company will not be losing anything, whereas if the traffic were not restored to the condition in which it lately

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was, the injury to the Great Northern company might be almost unbearable—at any rate it would be very serious, I suppose. Therefore I think that until the hearing or further order we ought to direct that the Great Central company do desist from diverting from the Great Northern company the fish traffic from Grimsby to London which is consigned *via* the Great Northern railway.

Balfour Broune, Q.C., C. A. Cripps, Q.C. (Ernest Moon and F. Balfour Broune with them), for the applicants.

All the docks having been constructed under the Act of 1849, the applicants have had no opportunity of reasserting their rights before Parliament.

As regards section 14 of the Act of 1851, a difference in principle, that is to say, as to the construction of the section (not a difference in detail that might be settled by engineers) has arisen, and therefore the Commissioners have jurisdiction under section 8 of the Regulation of Railways Act, 1873. There is also jurisdiction under section 9 of the Railway and Canal Traffic Act, 1888, sub-ss. (a) and (c).

Section 31 of the Act of 1866 gives running powers over all the dock railways and the use of the sidings and stations (which would include sheds) appertaining to those railways; it was probably not intended to confer the right to use in common the water space of the docks. The reciprocal running powers granted to the respondents by section 32 have no mention at all of "docks."

Littler, Q.C., Asquith, Q.C., C. A. Russell, Q.C. (Manisty with them), for the respondents.

There is no jurisdiction under sub-section (a) of the ninth section of the Railway and Canal Traffic Act, 1888, as providing a warehouse is not a traffic facility nor a matter mentioned in section 2 of the Act of 1854.

There is also no jurisdiction under sub-section (c), where the word "individual" must be given its natural meaning. These are legal rights which are enforceable in a court of law. No court of equity would grant specific performance after the lapse

of forty-nine years and the change of circumstances. This tribunal was never intended by section 9 to have jurisdiction to enforce a mere statutory contract between two companies independently of the question of facilities and of public interest.

The difference between the engineers mentioned in section 14 of the Act of 1851 has not arisen, and therefore there is no jurisdiction under section 8 of the Regulation of Railways Act, 1873—which does not empower the Railway Commissioners to declare the rights of parties, but to determine a difference.

Balfour Browne (in reply). Section 9 of the Railway and Canal Traffic Act, 1888, sub-section (a), goes far beyond the Act of 1854; the latter is confined to “reasonable facilities,” the former has the very wide words “relating to traffic facilities.” This jurisdiction was expressly transferred from the ordinary courts to prevent anomaly.

WRIGHT, J. : In this case the application of the Great Northern company against the Great Central company is based on two Acts of Parliament—on one which was passed in 1851, and on another which was passed in 1866. As regards the Act of 1851, certain rights of access and of obtaining a warehouse site were certainly given to the Great Northern company, and nothing has been brought to our notice which appears to me to have the effect of in any way abrogating those rights. I think also that we have jurisdiction to deal with the matter. I am not myself clear that we only have that jurisdiction under the first sub-section of section 9 of the Act of 1888, and I would rather not express any opinion upon that point—it is a matter of great importance—but I think we have jurisdiction as regards the warehouse, under the third sub-section, which refers to rights given to the public or to any individual. It seems to me the word “individual” must be construed as extending, not merely to what is commonly called an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems to me impossible to suppose that they would not be within the word “individual.” “Individual” seems to me to be any legal

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person who is not the general public. Supposing a trader had a right given him for a siding or anything else, and he converted his business into a limited company, it would be a strange thing to hold that because of that this Court lost its jurisdiction to enforce the rights which were given.

On the other point of jurisdiction which was raised by Mr. Russell, I feel some doubt whether, under the section of the Act of 1851, it is not a condition precedent to the exercise of our jurisdiction that the engineers of the two companies should have considered the matter and disagreed. Probably there might be circumstances equivalent to such a discussion and disagreement. Under certain circumstances, no doubt, an absolute refusal might be of such a nature, when made by one company, as would give the other company a right to say: "There is no use in going through the formality of consulting the engineers." But, however that may be, it seems to me that it is not our function to make abstract declarations which we should not enforce in their entirety, and I think that, before we make any effective order, or grant an injunction, under this Act of 1851, we ought to be supplied with some definite scheme put forward by an engineer of the Great Northern railway company on his professional responsibility, and considered by the respondents. This is all the more the case because 48 years have elapsed since the Act was passed, during which the Great Northern company have done nothing to give effect to their rights, and during that time, under the eyes of the applicants, the area of the docks has become filled up and appropriated. I think it would be contrary to the ordinary principles of justice to consider that the Great Northern company are now for all purposes in the same position as that in which they would have been if they had asserted their rights immediately after the passing of the Act of 1851.

I think, therefore, that as regards that Act we ought not to make a declaration without having further information and a definite scheme before us; but if the Great Northern company can show us that what they want is reasonably possible, then I for one should be prepared to make an order in favour of the Great Northern company, both as regards access and as regards

the provision of a site for a warehouse. I may say that so far as I can judge there is no impossibility for the provision of a site for a warehouse. Of course, if a scheme were propounded, it would not be for us, until the engineers had differed, to say whether the scheme propounded by the Great Northern railway company was a proper one or not, but, if they propound a definite site, then it does seem to be within our jurisdiction as arbitrators under the provisions of the Act itself, to say whether the site proposed is a proper one, and under what conditions the erection of the warehouse ought to be allowed.

The second right claimed by the Great Northern is under the Act of 1836, and there it seems to me even more plain that the Great Northern railway company have, subject to certain limitations, the rights which they claim. I do not think the reference to the docks can reasonably be construed as being a mere definition of the terminus *ad quem*. I think the words can only be construed as giving to the Great Northern company the right to run over and use the whole of the railways in the docks and all the appurtenances thereto. But there again similar considerations apply, except as regards the 33rd section. Under the 33rd section there is an absolute right which, if it is worth while, we will declare at once, that is, an admitted right on the part of the Great Northern to have accommodation for their clerks; but, as regards the other matters, I think we ought not to act without having a more definite scheme before us. The same considerations as to the time which has elapsed apply, and I think the Great Northern, after waiting so long, are bound to show us that what they ask us to do is possible in a business sense. If they do that, then I for one should feel no difficulty in giving effect to the provisions of the section.

As regards the fish traffic, if it is found necessary, I think we might act at any moment, and enforce the giving of further facilities, because it has been shown to us in evidence that facilities existed, before the Great Central railway was open to London, which were of great importance to the Great Northern company, and I see no reason why at least equal facilities should not now be given. At the same time, unless some declaration on these minor points is pressed for now, I think it will be better

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that we should hold our hands, as regards making a formal order on those points, until the companies have had an opportunity of seeing whether they cannot arrange the whole matter.

SIR FREDERICK PEEL : The West Riding and Grimsby Railway (Transfer) Act, 1866, section 33, authorizes the Great Northern to employ their own clerks and carting agents at the Grimsby docks, and requires the Great Central to provide as far as possible all proper and needful accommodation for them at the docks. It is not questioned that we have jurisdiction to deal with the obligation thus imposed on the Great Central, and that as a duty owed to the Great Northern, or as a special facility to be afforded to them, it comes within section 9 of the Traffic Act, 1888. By the Great Northern (Communication with the Sheffield Railway) Act, 1851, section 14, the Great Northern are in possession of another special right—that of renting a piece of land at the docks for warehouses. A place to deposit goods in the course of transit has to do, I think, with the receiving and forwarding of traffic, and falls, not less than accommodation for clerks and carting agents, within that section of the Traffic Act; and if there is a refusal to give a warehouse on the ground that the right to require one no longer exists, and not merely because there is no piece of ground available to allot as a site, the Great Northern are, I think, entitled to have it declared that the Great Central are bound to provide as far as possible the convenience of a warehouse. But as to the particular site, and any matter as to terms and conditions, that will be best determined in the manner provided for that purpose by section 14 of the Act of 1851.

Among the powers which the Great Northern have under the two special Acts referred to, is that of using the railways and works of the docks. This power extends to all parts of the existing docks; and as to whether article 23 of the agreement, set out in the third schedule of the Sheffield (Extension to London) Act, 1893, shows an intention not to resort to it, it appears to me that it does not, as the article applies equally whether the Great Northern traffic to and from Grimsby docks

is carried by them or the Great Central. But I think that before it would be proper to enjoin the Great Central to arrange for the exercise of these powers of user, the Great Northern ought to show that the exercise of them could be so regulated as not to interfere with the convenient conduct of the business of the docks, the contention of the Great Central being that it would throw insuperable difficulties in the way of the management.

Lastly, I think the Great Northern company are entitled under the Traffic Acts to have the trucks for their fish traffic placed in as favourable a position for loading as the trucks of the Great Central.

LORD COBHAM: I quite agree in the judgments pronounced by my colleagues.

[Solicitor for the applicants: *R. Hill Dawe*.

Solicitor for the respondents: *R. Lingard-Monk, Manchester*.]

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In the Matter of a Reference under the Cheap
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IN RE LONDON REFORM UNION

AND

GREAT EASTERN RAILWAY COMPANY (1).

*Proper and sufficient Workmen's Trains up to 8 a.m.—Reasonable Fares—
Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 3.*

April 20, 21,
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Section 3 of the Cheap Trains Act, 1883, empowers the Board of Trade, where it has reason to believe that proper and sufficient workmen's trains are not provided for workmen at reasonable fares and times between 6 p.m. and 8 a.m., to refer the matter to the Railway Commissioners when required to do so by the railway company.

By the Great Eastern Railway (Metropolitan Station and Railways) Act, 1864, s. 80, the Great Eastern railway company are required to run one stopping train daily each way, not later than 7 a.m. inwards or earlier than 6 p.m. outwards, on the lines between Liverpool Street and Edmonton and Liverpool Street and Walthamstow respectively, "for artizans, mechanics and daily labourers, both male and female, and having business daily in London," at fares not exceeding 1d. for the journey each way.

The Great Eastern company voluntarily extended the Edmonton service of trains to Enfield, and ran a frequent service of trains between the hours of 5 a.m. and 8 a.m. at cheap rates for the benefit of workmen and other persons residing on the Enfield, Walthamstow, and Stratford branches of the railway and having employment in London. These trains were of two kinds, viz. :
(1) Cheap trains run between the hours of 5 a.m. and 6.47 a.m. The fare charged by these trains being 2d. for a return ticket, and the last of these trains being timed to arrive at Liverpool Street station not later than 6.47 a.m.
(2) Cheap trains, by which workmen are allowed to travel at half the ordinary return fares (with a minimum of 4d.), which are timed to reach Liverpool Street station after 6.47 a.m. and before 8 a.m.

Upon complaint that on the Enfield, Walthamstow and Stratford branches of the Great Eastern railway there were no trains provided for workmen at 2d. return fares, arriving in London later than 6.47 a.m., it was proved that the

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

existing 2*d.* trains were overcrowded and could not accommodate all the work-people requiring to come to London for their work, and that numbers of them had no alternative but to travel by the half-fare trains. It was also proved that the hours of labour have become later, in many cases not beginning until 8 a.m. or 9 a.m., so that workpeople in order to have the benefit of the cheapest trains had to travel by trains which brought them to London an hour, or even two hours, too soon. At the hearing, the railway company offered to add to the existing service of 2*d.* trains three new trains, which would be timed to arrive in London between 6.47 a.m. and 7 a.m.

Held, that in addition to these trains, the railway company must run as an experiment at least two trains from Edmonton, two trains from Walthamstow, and one train from Stratford, starting after 7 a.m. and arriving in London as near 8 a.m. as possible, at fares less than the half-fares charged at the present time, and that a reasonable fare to be charged by such trains would be 3*d.* return, except between Stratford and London, which should be 2*d.* return.

As under the Cheap Trains Act, 1883, railway companies obtain a partial remission of passenger duty on certain conditions, one of which is the running of workmen's trains, the question of whether there is a remunerative profit from the fares by such trains is not a matter which the Court will consider.

THIS was a reference by the Board of Trade under section 3 of the Cheap Trains Act, 1883.

The Board of Trade received a memorial from the London Reform Union complaining of the inadequacy of the workmen's trains on the Great Eastern company's lines between Enfield, Walthamstow, Stratford and Liverpool Street stations.

The chief complaint of the union was, that of the cheapest trains run by the company (at 2*d.* return), the latest arrived at Liverpool Street at 6.47 a.m., while there were many work-people who did not commence work till much later.

This class of people were not served by the "half-fare" trains running between the hours of 7 and 8 a.m. at half the ordinary fare, with a minimum fare of 4*d.* The complaint was referred by the Board of Trade to the Railway Commissioners for decision.

The railway company, in their answer to the complaint, stated that they had far exceeded their statutory obligations; that the cheapest trains were run at a very small profit, if at a profit at all; and that to run these trains at the same hours as the "half-fare" trains would cause great overcrowding on the railway and inconvenience to the "half-fare" passengers; and that the "half-fare" trains fulfilled the obligation imposed by the Cheap Trains Act, 1883.

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1899. *Vesey Knox* (*W. S. Robson, Q.C.*, and *Arnold Inman* with him), for the London Reform Union. The remission of the passenger duty by the Cheap Trains Act, 1883, was a subsidy to the railway companies. The advantages granted by that Act up to 8 a.m. should not be refused by the railway company after 7 a.m. Such refusal compels workmen to travel by the "half-fare" trains, or else to arrive in London two hours before their work commences.

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H. F. Dickens, Q.C. (*Lewis Couard* with him), appeared for the London County Council, with the permission of the Court.

C. A. Cripps, Q.C., *C. A. Russell, Q.C.* (*Ernest Moon* and *F. Balfour Browne* with them), for the Great Eastern railway company. The sum of 2*d.* is not a reasonable return fare to Enfield (eleven miles) or to Walthamstow (seven miles). Because this 2*d.* fare exists as an exceptional fare not found on other lines, it does not make the "half-fare" charged by the later trains "unreasonable." So far from the "half-fare" being prohibitive, the later trains are crowded.

The company's Act of 1864, section 80, only gives train facilities up to 7 a.m., and really referred only to those workmen who had been displaced by the construction of Liverpool Street station.

WRIGHT, J. : By the Great Eastern Railway (Metropolitan Station and Railways) Act, 1864, the company obtained powers for the construction in London of a station and other works, involving the displacement of large numbers of the working classes; and by the 80th section of the Act they are required to run one stopping train daily each way on the lines between Liverpool Street and Edmonton and Liverpool Street and Walthamstow respectively, not later than 7 a.m. inwards or earlier than 6 p.m. outwards, for "artizans, mechanics and daily labourers, both male and female, and having business daily in London," at fares not exceeding 1*d.* for the journey each way.

By the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), all the railway companies obtained a partial remission of passenger

duty, to the extent in the case of this company of about 70,000*l.* a year, on conditions, one of which is the provision on passenger lines of proper and sufficient workmen's trains for workmen going to and returning from their work, at such fares and at such times between 6 o'clock in the evening and 8 o'clock in the morning as appear to the Board of Trade to be reasonable, subject to an appeal to this Court. In the present case the matter is referred to us in the first instance by the Board of Trade.

The Great Eastern railway company have done much more than their own Act requires. They maintain excellent services of workmen's trains down to 6.47 a.m. between Liverpool Street and the three principal suburban districts inhabited by workmen in the neighbourhoods of Edmonton, Walthamstow and Stratford respectively. On each of these lines there is a frequent service of such trains arriving until 6.47 a.m. at the return fare of 2*d.*, which must be regarded as very low and barely remunerative except for short distances such as Stratford, or in the case of full trains for distances such as those from Enfield, Edmonton or Walthamstow.

It is, however, alleged by the applicants and the County Council that the time has come for a further improvement in the services. The principal object of the applicants is to obtain later morning trains into Liverpool Street at the lowest fares. It is said that the hours of labour have become later, not now beginning in many trades—and those in some cases the worst paid—until 8 or 8.30 or even 9 a.m. or later, and that it is a hardship to the workpeople, male and female, that in order to have the benefit of the cheapest fares they must travel by trains which bring them to London an hour or even two hours too soon. In the case of women and girls the objection, if well founded in fact, may be especially serious. The inconvenience is so great that it is estimated that a very large percentage, amounting, as is suggested, to over 50 per cent. of the workmen, are driven to travel by later trains at a return fare of 4*d.*, which in my opinion is too high; and if these 4*d.* trains cannot be regarded as workmen's trains at reasonable fares, there are not sufficient workmen's trains at reasonable fares.

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The existence of the demand and even necessity for later trains at reasonable fares is proved by a large mass of evidence, and indeed is not denied by the company. Their answer to the application is as follows:—They do provide a regular and frequent service of trains between 7 a.m. and 8 a.m. at fares which may be generally described as 4*d.* return fares; and it is said that these are reasonably low, being for the longer distances only half the ordinary fares, and that 2*d.* trains cannot be run during the same hour without displacing some of the 4*d.* trains, and drawing off, to the damage of the company, passengers who now use and can afford to use the 4*d.* trains. Especial stress is laid on the fact that the existing services nearly exhaust the capacities of the railway at Bethnal Green junction, through which all the trains must pass.

A minor ground of complaint is that the 2*d.* trains, especially the latest of them, are overcrowded, and the same complaint is made also of the 4*d.* trains. This is an evil which in the case of the earlier trains will disappear if the main demand for later 2*d.* trains can be satisfied, and in the case of trains between 7 a.m. and 8 a.m. may be partly or wholly obviated by an increase of the number of third-class coaches in each train and the widening of the coaches. At present every train comprises three first-class coaches, and it is admitted that these can ordinarily be reduced to one.

The company have offered to make a considerable concession by adding to the existing service of 2*d.* trains three new trains, distributed as they may find best over the three lines and arriving between 6.47 and 7 a.m., and this addition will no doubt greatly relieve the overcrowding at that time of the morning, especially if the new trains are composed mainly of third-class coaches.

I do not, however, think that this is sufficient. I think that a service of trains at a fare less than 4*d.*, starting after 7 a.m. and arriving as near 8 a.m. as the company are able to arrange, ought to be tried, either by means of additional trains or by way of substitution for some of the 4*d.* trains. The extent to which such a service can be given, and the conditions of it, must be matter for consideration and experiment; but so far as

I am able to judge, I think that it would be possible without undue interference with the 4*d.* service to run at least two such full trains starting from Edmonton, two from Walthamstow, and at least one from Stratford. At Edmonton the company have already provided separate station accommodation at which this special traffic can be dealt with, and similar accommodation at Walthamstow can be provided at an estimated initial cost of about 2,500*l.*; and I think that it cannot be difficult, by means of the issue of weekly or fortnightly tickets in advance on written applications or otherwise, to confine the use of the trains to the workmen for whom they are intended. But in the cases of Edmonton and Walthamstow the 2*d.* return fares are very low in proportion to the distances travelled; and as the company will be put to some expense and trouble in arranging for the special services, the company ought in my opinion to be allowed to charge a return fare not exceeding 3*d.*, which on a full train of 600 passengers on the inward journey will, after providing for the evening return, produce about 5*s.* per mile run on the double journey of the train in the morning from and to Walthamstow, in addition to the fares of any passengers in the opposite direction, as against Sir W. Birt's estimate of 3*s.* as the working cost per mile run. In the case of Stratford the 2*d.* fare appears to me to be sufficient.

If the company find it impracticable to run these trains in addition to the existing 4*d.* service, and are therefore obliged to reduce the number of the 4*d.* trains, the deficiency thus caused in the 4*d.* accommodation can be made up wholly or to a great extent by increasing the proportion of third-class accommodation in each train. The 4*d.* fares are remunerative with reasonably full train-loads one way, and we cannot admit the plea that the company are not at present possessed of enough third-class rolling stock for the proper accommodation of remunerative traffic.

Instead of providing new 2*d.* trains between 7 a.m. and 8 a.m., it will be open to the company, if they think fit, to reserve for the 2*d.* passengers a sufficient number of coaches in the 4*d.* trains arriving as near 8 a.m. as may be.

Compartments for females ought to be provided in all the

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trains, and a sufficient proportion of tickets should be assigned for them if any system of reserved trains or places is adopted.

We must allow the company a reasonable time to formulate a scheme for giving effect to the views which we express, and for that purpose we propose to adjourn our final decision until the 1st June.

SIR FREDERICK PEEL: The question referred for our decision under the Cheap Trains Act, 1883, is whether on the Great Eastern lines from Enfield, Walthamstow, Stratford (Central), and Stratford Market respectively to Liverpool Street, and from Stratford Market to Fenchurch Street, proper and sufficient workmen's trains are provided at such fares and at such times between 6 p.m. and 8 a.m. as appear to us, having regard to the circumstances, to be reasonable.

The cheap morning trains run by the Great Eastern on these lines are of two kinds, one being trains for which tickets are issued at half the ordinary third-class returns, with a minimum of 4d., and the other trains at fares of 2d., including the return journey. The 2d. trains are specially for workmen, and the half-fare trains for classes of passenger traffic somewhat better able to pay for their journeys. The two kinds are separated by the time of arrival at the London terminus, according as they arrive before or after 6.45 a.m., trains arriving up to 6.45 being the workmen's trains, and between that time and 8 o'clock the half-fare trains; and the substance of the application is that the company should issue 2d. tickets for workmen available by trains arriving later than 6.45, as well to relieve the overcrowding in the existing 2d. trains as because most of the places of business at which the passengers by those trains are employed do not commence work until 8 o'clock or later. From a return taken in February last of the number of passengers by the cheap up trains into Liverpool Street, it appears that on the Enfield and Walthamstow branches each kind of trains carries daily at that time of year about 10,000 passengers, and it is alleged that the bulk of the passengers by the half-fare trains are workmen, and that a lower charge than the half-fare is needed for them. The evidence goes to show that the women and girls in particular

cannot afford the half-fare, and that consequently they have to use trains which arrive much too soon for the time when their work in London commences, and oblige them to loiter about at the station in London for an hour or more. In Walthamstow the working-class population has so increased of late that there are now, it is said, more workmen requiring to come to London for their work than the existing trains can accommodate, and numbers of them have no alternative but to come by the half-fare trains and to pay the higher fare of 4*d.* or 4½*d.* The case is much the same at Edmonton, on the Enfield branch, and there the later 2*d.* trains had become so overcrowded that as to the last four of them the company have, from 13th February last, limited the tickets they issue for each train to the number it can seat, and allow no persons to get into it in excess of its seating accommodation. In addition, in the latest of the four trains, that which leaves Edmonton at 6.21 a.m., they reserve 200 tickets for women. Those, however, who travelled by these trains, in excess of the numbers to which they are now restricted, overflow into the half-fare trains (fare 5½*d.*), unless they are content to take one of the earlier 2*d.* trains, the latest of which leaves at 5.37 a.m. These being the circumstances, the question is, do the company comply with the Act, which requires them to provide sufficient trains for workmen going to their work? The 2*d.* trains alone do not satisfy this requirement, but the deficiency is made up by the half-fare trains, if the fares charged by those trains are reasonable. The minimum of such fares is 4*d.*, and I think, so far as these trains are to be regarded as workmen's trains, the fare is too high. The company consider they are justified in charging it, on the ground that the receipts from the 2*d.* trains on the Enfield and Walthamstow lines are only sufficient to cover working expenses and yield nothing towards interest on capital. But then, in consideration of their running workmen's trains, the company are, under the Cheap Trains Act, relieved from paying any passenger duty on all fares which do not exceed 1*d.* a mile, and the benefit which they gain by this exemption from duty amounted in the year 1896 to 68,000*l.* The company therefore obtain a large sum every year conditionally on their running workmen's trains, and

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there is no occasion to make the question of these trains depend upon a consideration of how they stand as regards a remunerative profit from the fares, seeing what these trains earn for the company by saving them from paying duty on all those fares which do not exceed 1*d.* per mile. The half-fare trains, then, not counting, there are not sufficient workmen's trains; and as to what the addition should be, the applicants ask for three more trains at 2*d.* fares from Enfield and Walthamstow respectively, starting after the existing 2*d.* trains, and to be put on either as new trains or by converting one or more of the half-fare trains into trains at fares of 2*d.* I think these proposed trains are not more than are required to make the service for workmen sufficient, and, as far as the limit to the capacity of the lines into Liverpool Street station is concerned, it appears that there is room for three additional trains to get into that station between 6.47 and 7 a.m., and also that there is a margin for a few more trains in the time between 7 and 8 o'clock, should the alternative to partially filling up that time, of converting two or three half-fare trains into 2*d.* trains, not be adopted. It has, however, to be remembered that the saving of time by the later 2*d.* trains may create a difficulty from the numbers that may on that account give them the preference over the earlier trains; and, as a check upon this, and to equalise the different trains in the matter of the advantages and disadvantages they present, an addition not exceeding 1*d.* may reasonably be made to the fare by such later trains.

With regard to the service from Stratford (Central) and Stratford Market to Liverpool Street and from Stratford Market to Fenchurch Street, the ordinary third-class return to Liverpool Street is 5*d.* and to Fenchurch Street 4*d.*; and as the minimum by the half-fare trains is 4*d.*, these trains offer but a small benefit to workmen as regards fare, and, for so short a distance as 4 or 4½ miles, a fare of 4*d.* does not seem a reasonable fare for a train which is to count as a workmen's train. For this class of train, in this case 2*d.* seems a reasonable fare, and the complaint is that the present 2*d.* trains are not sufficient for the service. From Stratford (Central) the latest 2*d.* train to Liverpool Street leaves at 6.7 a.m., and in the analysis made

last February, under instructions from the London County Council, of the classes to which the passengers by the half-fare trains belonged, the working class appear to have largely preponderated. To give them, then, the reasonable fare to which they are entitled, it is suggested that 2*d.* tickets should be available by some of the half-fare trains in carriages reserved for workmen, or that a portion of the half-fare trains should be converted into 2*d.* trains, and I am of opinion that the company should make such arrangements as that workmen may be able to travel at a fare of 2*d.* return from Stratford (Central) to Liverpool Street by three more trains than they can at present travel by at that rate, and by one more from Stratford Market to Liverpool Street and Fenchurch Street respectively.

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LORD COBHAM: The facts of this case, which are hardly in dispute, have been fully stated, and I need not repeat them in detail. The main complaint we have to deal with is, that on the Enfield, Walthamstow and Stratford branches of the Great Eastern railway company, there are no morning trains provided for workmen at 2*d.* return fares, arriving in London later than 6.47 a.m. There are many subsequent trains up to 8 a.m., but it is urged that the fares charged for them are more than workpeople can afford to pay, and that practically, between 6.47 a.m. and 8 a.m. no workmen's trains are run at all. For instance, the last 2*d.* train from Enfield town to Liverpool Street starts at 6.6 a.m. After that there are no trains, the return fare by which is less than 8*d.*, or 4*s.* a week to a workman travelling daily to London and back. Taking the shorter distances, the 4*d.* minimum comes in, and the term "half-fare" for these trains becomes illusory, being only 1*d.* less than the ordinary fare in the case of Stratford Central, and identical with it in the case of Stratford Market to Fenchurch Street.

I am unable to regard this service as providing, as the Cheap Trains Act requires, "Proper and sufficient workmen's trains at such fares and at such times between 6 o'clock in the evening and 8 o'clock in the morning" as are reasonable. It is perfectly true that a large number of workpeople use these half-fare trains, as they are termed, especially those from the

1899. **Walthamstow stations, and I agree with the company in thinking that there is at least a presumption that these people can afford to pay the fare which they do in fact pay. I entirely dissent from the argument that "workmen" should be regarded as a class one and indivisible, every member of which is entitled to be carried by rail on the cheapest possible terms. This very case proves that workmen divide themselves into at least two classes—those who can afford to pay only 1s. a week for being taken to their work, and those who can pay up to 3s. and 4s. The railway company do no wrong in making the higher charge, and they are perfectly entitled to claim their later trains up to 8 a.m. as "workmen's trains," although they are run for the benefit of the better-to-do workmen, with a certain admixture of clerks and others.**

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Unfortunately a large proportion of the working class belong to the category of those who can only afford the 1s. a week, and we must, I think, in administering this Act have special regard to them. It cannot, to my mind, be thought reasonable that people for whom Parliament, in return for a very valuable concession to the railway companies, has secured that due railway facilities should be provided up to 8 o'clock in the morning, should be allowed to enjoy these facilities only up to half-past six or a quarter to seven. I think the railway company have somewhat under-estimated the evils of a wage-earner being landed in London one or two hours or more before his work begins. The loss of an hour's early morning sleep to hard-worked people cannot but be prejudicial to strength and vitality, especially in the case of the old and weakly, and of the numerous boys and young girls who travel up by these trains. Then the long interval of enforced idleness, or of loitering about the streets or station in the early morning, means a waste of valuable time, and may be harmful to many. In short, the benefits of the exceptionally cheap fares granted by the Great Eastern company are largely discounted by the narrow limits of time within which they are allowed to operate.

The railway company, in their reply, do not substantially deny the main allegations of the applicants, but they contend that they do all that can be reasonably expected of them, having

regard to their own interests, the convenience of other travellers, the carrying capacities of their line, and the legitimate claims of the workpeople. As to the last point, the company, as I have endeavoured to show, have failed to sustain their contention; as to the other considerations, the Court, in the proposals they make, believe that due regard has been had to them. It may be granted that the mere conversion of some or all of the half-fare trains into 2*d.* trains would do little or nothing to diminish the overcrowding that takes place on certain trains, which is also a subject of complaint in this case. In dealing with such numbers, some overcrowding is inevitable, especially in the case of the more conveniently-timed trains. Uniform fares would probably increase the mischief, and it is owing to this consideration that I think it advisable that there should be a further graduation of fares than at present exists. 3*d.* trains, interposed between the 2*d.* and the half-fare trains, would have the effect of drawing passengers from the 2*d.* trains who can afford to pay 3*d.*, and others from the half-fare trains to whom these fares are a severe strain upon their means. There would thus be some relief to the later and more crowded 2*d.* trains, and if the company found it possible, instead of putting on additional trains after 7 a.m., to convert some of their earlier and less well-filled half-fare trains into 3*d.* trains, I doubt if, on the whole, they would be losers. There may probably be a loss at first, but I concur with Mr. Vesey Knox, when he points out that the remission of a large part of the passenger duty was meant to meet this very contingency.

I cannot follow the argument that because the company were encouraged by that remission to reduce their third-class fares by a greater amount than that of the passenger duty remitted, therefore we should not take the remission into consideration. The reduction of the third class was wisely effected in the company's own interest, and very much to its profit; the fund, therefore, saved from the duty is still intact and able to safeguard them from any loss which can reasonably be expected to accrue from a workmen's train service improved within the limits defined by us. More deserving of weight is the contention that there is very little margin of time within which addi-

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tional trains could be run. But Sir W. Birt very frankly admitted that with some re-arrangement of existing trains, three additional ones might be put on before 7 a.m., and, although we think it necessary that there should, in addition to this concession, be trains running on the Enfield and Walthamstow branches between 7 a.m. and 8 a.m. at, as we suggest, 3d. fares, and some additional facilities on these and the Stratford line, this does not of necessity involve any additional trains between those hours.

I have only to add that I generally concur with the proposals that have commended themselves to my colleagues, which do not, in my opinion, go beyond the requirements of the case, and should be adopted by the railway company.

[Solicitors for the London Reform Union : *Beal and Payne.*

Solicitor for the London County Council : *W. A. Blaxland.*

Solicitor for the Edmonton Workmen's Trains Committee :
John Avery.

Solicitor for the Great Eastern railway company : *E. Moore.*]

In the Matter of a Reference under the Cheap
Trains Act, 1883.

IN RE LONDON REFORM UNION AND NATIONAL ASSOCIATION
FOR THE EXTENSION OF WORKMEN'S TRAINS

AND

GREAT NORTHERN AND NORTH LONDON RAILWAY COMPANIES ⁽¹⁾.

*Proper and sufficient Workmen's Trains—Small Working-Class Population—
No Profit to Railway Company—Running Powers by Agreement—
Experimental Service—Cheap Trains Act, 1883 (46 & 47 Vict.
c. 34), s. 3.*

The Railway Commissioners will not order workmen's trains to be run under the Cheap Trains Act, 1883, unless there is proved to be in existence a class of workmen residing on the railway and requiring such a service; *i.e.*, they will not order trains to be run in advance of requirements.

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The fact that an improved workmen's train service might relieve a congested district in London by inducing workmen to reside outside the metropolis, does not justify the Commissioners in ordering such an improved service.

Proof by a railway company of no profit, or even a loss, on running workmen's trains, is not sufficient answer to a complaint of the non-provision of "proper and sufficient workmen's trains" under the Cheap Trains Act, 1883.

Seemle, that where two railway companies maintain a through passenger service between their systems by agreement with each other, but have no statutory running powers over each other's lines, the Commissioners have jurisdiction to order a proper service of workmen's trains to be provided for that through service.

THIS was an application under section 3 of the Cheap Trains Act, 1883.

The Board of Trade received a memorial from the "London Reform Union" with regard to workmen's trains on the Great Northern and North London railways, and also from the

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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“National Association for the Extension of Workmen’s Trains,”

having reference to the Great Northern railway.

The Board of Trade referred both complaints to the Railway Commissioners’ Court, where they were heard together.

The lines to which the applications referred were four: (1) The main line from New Barnet to King’s Cross *via* Wood Green and Finsbury Park; (2) the branch line from Enfield to Wood Green; (3) the branch line from High Barnet to Finsbury Park, *via* Finchley; and (4) the branch line from Edgware to Finchley, this last being a single line.

From King’s Cross the Great Northern company had running powers over the Metropolitan railway, and ran their trains into Moorgate Street. From Finsbury Park there was a line connecting with the North London railway company’s system near Canonbury, over which the latter company maintained a through service of trains to Broad Street by agreement with the Great Northern railway company, though neither company had any statutory running powers over the lines of the other.

The Great Northern railway company had no statutory obligation to fulfil. They ran no workmen’s trains from Edgware, and none to Broad Street. As regards the other stations they had the following arrangement:—Between the hours of 5 a.m. and 6.30 a.m. in summer, and 5 a.m. and 7 a.m. in winter, they ran a service of trains to King’s Cross and Moorgate Street at a quarter the ordinary fares; while between 6.30 a.m. and 8 a.m. in summer, and 7 a.m. and 8 a.m. in winter, they charged half the ordinary fare.

The “London Reform Union” asked that these half-fare trains, or many of them, from New Barnet, Enfield and High Barnet, should be turned into workmen’s trains with a maximum fare of 3*d.*, or that there should be an equivalent service between 6 a.m. and 8 a.m. New Barnet and Enfield were distant some 9 miles from King’s Cross, and High Barnet and Edgware some 11 miles.

They also asked for workmen’s trains from Edgware and over the North London line to Broad Street.

The “National Association for the Extension of Workmen’s Trains” applied for additional workmen’s trains (by transferring

the half-fare trains or otherwise) from Wood Green and intermediate stations to King's Cross and Moorgate Street at a return fare of 2*d*. Wood Green was 4 miles 78 chains from King's Cross.

The Great Northern railway company stated in their answer that they provided ample accommodation at low fares for the workmen residing on their system, and that neither the fares nor times proposed by the applicants were reasonable. With regard to Edgware, they said that there was a very small population living on that branch. They further contended that the Court had no power to order them to provide workmen's trains on any line or between any stations except their own, or to order them to exercise running powers over other railways, and that no order could be made as to the Metropolitan railway company's line to Moorgate Street station, as that company were not "parties" to this application.

The answer of the North London railway company also submitted that the Court had no jurisdiction over them in the present reference, and that they should not be compelled to provide accommodation for workmen residing on other companies' lines. They stated that they fully complied with their obligations on their own lines.

Ernest Moon (Littler, Q.C., and J. Shaw with him) for the North London railway company. The North London company have no statutory running powers to Finsbury Park, the whole service is an "agreed" one between the companies. There has been no evidence that workmen residing in the Great Northern company's district desire to go to Broad Street.

Vesey Knox for the London Reform Union:—The Commissioners can order the two companies to bring up a scheme under section 14 of the Railway and Canal Traffic Act, 1888.

WRIGHT, J.: The case with regard to Broad Street is not sufficiently strong for the Commissioners to deal with at present, but they have no doubt that they would have power to deal with a case, should it arise.

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Vesey Knox and Arnold Inman for the London Reform Union.

The ten trains asked for on the Great Northern railway between 6.30 and 8 a.m. will admittedly not be filled at present. The half fares are at the rate of $\frac{1}{2}d.$ per mile, and the fares have not been lowered since the Cheap Trains Act, 1883. The fact that there are no workmen's trains on the Edgware line prevents there being any workmen living on that line. The agreement between the Great Northern and Metropolitan railway companies admits of the former fixing the trains and the hours to Moorgate Street station without consulting the latter company, also the fares, subject to a minimum.

H. F. Dickens, Q.C. (Lewis Coward with him), with the permission of the Court, for the London County Council. If the "half-fare" trains are turned into "quarter-fare" trains it will be an inducement to the workmen in the congested districts near King's Cross to leave the metropolis for the suburbs, as has happened on the Great Eastern company's system.

Balfour Browne, Q.C., C. A. Cripps, Q.C. (R. Whitehead with them), for the Great Northern railway company. The Great Northern company run more trains for workmen than the traffic requires, and there is a loss on every "quarter-fare" train. Since 1893 both the "quarter-fare" and "half-fare" tickets issued have been practically stationary, which shows that the workmen have not been driven into the "half-fare" trains.

WRIGHT, J.: We have indicated our opinion upon the main parts of the case. We do not at all think that Parliament intended the Cheap Trains Act to throw upon railway companies the duty of opening out neighbourhoods for the creation of new workmen's residential districts. We quite appreciate the immense importance of the question from the point of view of the London County Council and of Mr. Knox's clients, but we do not think that we should be acting within the powers given us by Parliament if we made orders in that way. As soon as there exists a class which demands the accommodation, it is our duty to see that proper accommodation is afforded. At present

such a class is not proved to exist. There is strong reason, I think, to suppose that there is a class of workmen sufficiently numerous in the neighbourhood of Bowes Park and Wood Green to require every reasonable accommodation for the purposes of their daily labour. In order to determine at what fares they ought to receive that accommodation, we think we have not sufficient information at present, and we must have more, because we must have regard to the question how far the railway company will suffer by these onerous terms being imposed upon it. We do not for a moment say—and I think I speak for the whole Court—that it would be a sufficient answer for the railway company to say that they would make no profit, or even that they might make some loss upon the arrangement as ordered or suggested, but all those things have to be borne in mind, and before we could properly make an order of any extensive application which would lay any great burden upon the railway company we ought to be quite sure, or as sure as we can be, that there is sufficient demand on the part of the existing workmen for it, and that no undue burden would be laid on the railway company. In order to ascertain that, we have asked them to make an experiment, and Mr. Steel undertakes that they will make an experiment, and no doubt it will be made in the greatest good faith, that experiment being that on one branch where the workmen at present most reside (the Enfield to Moorgate Street branch), two additional trains with about 500 seats in each are to be run between the hours which have been indicated (6.30 and 7.30 a.m.), subject to the consent of the Metropolitan railway company being obtained. If that consent is not obtained, of course we shall have to try and carry out the experiment in a different way. Leave will be given to Mr. Vesey Knox to apply if there is any difficulty about that.

Then the basis of it is to be the existing so-called quarter-fare fares, but with the understanding that the $3\frac{1}{2}d.$ fare to Moorgate Street is to be $3d.$ It is asked by the railway company that the experiment should not begin till the 1st October, and we see nothing unreasonable in that. Of course it will be open to the Great Northern railway company to come at any

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time if they think fit either to show that the experiment has failed, if it has failed, after a fair trial, or to abstain from raising any further question. It will be open equally to the present applicants if they think a fair trial has not been given, after the three months has expired, to apply as they may be advised.

[Solicitors for the London Reform Union : *Beal & Payne*.

Solicitor for the London County Council : *W. A. Blaxland*.

Solicitor for the Great Northern railway company : *Hill Dawe*.

Solicitor for the North London railway company : *Burchell*.]

In the Matter of a Reference under the Cheap
Trains Act, 1883.

IN RE THE FAWCETT ASSOCIATION

AND

THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY
COMPANY (1).

*Early Trains for Postmen—Benefit and Cost not commensurate—Insufficient
Numbers—Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 3.*

The Court will only exercise their powers under the Cheap Trains Act, 1883, July 28, 1899. where the demand for accommodation is sufficiently large to bear some relation to the difficulty of giving that accommodation, and where there is some comparison between the benefit which will be afforded by an order of the Court for the accommodation asked for and the cost to the railway company of giving it.

Semble, that persons employed in the postal service as letter sorters and postmen are "workmen" within the meaning of the Cheap Trains Act, 1883.

THIS was an application under section 3 of the Cheap Trains Act, 1883.

The Fawcett Association, which was an association of postal sorters, petitioned the Board of Trade for two early trains on the London, Brighton and South Coast railway, at 3 a.m. and 4 a.m. approximately, to be run from West Croydon to London Bridge, and also for two trains at similar hours from Victoria to London Bridge *via* the South London line. The complaint was referred by the Board of Trade to the Railway Commissioners for decision.

The facts of the case are sufficiently stated in the judgment.

The association was represented by their secretary, Mr. Farrell.

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount CORHAM, sitting at the Royal Courts of Justice, London.

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C. A. Cripps, Q.C. (Ernest Moon with him), for the London, Brighton and South Coast railway company.

At present the passenger stations on this line are closed for three to four hours in the night, and to have them open would require an additional staff. The number of persons who would use the proposed trains would be quite insignificant.

WRIGHT, J. : In this case we have to consider whether the obligation imposed by the Cheap Trains Act of 1883 has been shown to be violated in the case of persons employed by the Post Office. The obligation on the company is "to provide proper and sufficient workmen's trains for workmen going to and returning from their work at such fares and at such times between 6 in the evening and 8 in the morning as appear to the Board of Trade to be reasonable." Now here, speaking for myself—it has not been argued by Mr. Cripps at present, and, therefore, I do not say anything finally about it—but speaking for myself, I should think that that provision ought to be construed, not in a narrow sense, but in such a sense that it would include persons employed in the postal service. That is my present impression; and if it were made out that there was a sufficiently large number of postmen in the district served by this railway who had occasion to arrive at London Bridge, or at any other stations on the railway, at an early hour, I should be inclined to view favourably their application. Certainly, I am not at all impressed with the evidence given for the company, either as to the cost of providing such accommodation, or as to the necessity of providing an entirely new staff—two persons to each station. There was a certain amount of *non possumus* which naturally arises in the minds of gentlemen when they are first approached on these subjects, which very often vanishes after they have considered it a little more, and I do not think the very able manager of the Brighton railway company would find much difficulty in dealing with this question of an additional early train if it should turn out on any future application that a sufficient number of postal officials really required it. Further, I think it is clearly established that as regards a certain number of the sorters, and probably a certain

number of the other persons employed in the Post Office, there is very great hardship and serious inconvenience caused by the absence of early trains. I have no doubt whatever that a considerable number of them are obliged, in order to get to their work in time in order not to forfeit their employment at the Post Office, to get up at very unreasonable hours, and walk long distances to get to the places of their employment. But in all these things the Act of Parliament intends that there is to be some comparison—that there is to be something commensurate between the benefit to be given by an order of this Court and the cost to the railway company of giving it. Of course, the railway company had, as Mr. Farrell points out, a large fund to draw upon if the mere expense of the service can be regarded as any objection. But the Act of Parliament cannot intend, and it is absolutely impossible that it can be construed as intending, that a special service of trains shall be provided for every section of every kind of employment. There must be some limit to that. It must be intended that the powers of the Act shall be exercised only where there is a sufficiently large demand for accommodation to bear some relation to the difficulty of giving the accommodation.

Now, here I think that Mr. Cripps is right in saying that in substance the demand is not shown to exist except for those who are employed at the Denman Street and Borough offices, and that as regards the persons employed at those postal offices the number is not shown to be sufficient to justify a special service. Of course, Mr. Farrell and his association have been in a great difficulty in attempting to get full information as regards this matter, and it may be that further investigation will show that a much larger number of people in the employment of the Post Office are resident near the Brighton railway, and desire these early trains, or that a much larger number, including any class of workmen, not confining it to the Post Office, but any class of workmen at the fish market or elsewhere, also desire these early trains. If it were, as Mr. Farrell put it, that he could show that 1,000 or 1,500 people really wanted this accommodation, I think this Court would be very slow to refuse it, but I think there is no such proof at all. I

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think only about 70 or 80 people are shown to be at present wanting this accommodation. Mr. Capel, from the General Post Office, told us of 150 persons going to the General Post Office who wanted an early train, but they do not come from this railway. They come from the Great Eastern railway, and this railway will not help them to the General Post Office in the same way that the Great Eastern railway helps them to the General Post Office. So far as I am concerned, on the ground that the demand has not been shown to exist on the part of a sufficient number of persons resident near the railway, I think that there is no power in this case under the Act of Parliament to order provision to be made for the traffic.

SIR FREDERICK PEEL : I agree.

LORD COBHAM : I agree.

[Solicitors for the London, Brighton and South Coast railway company : *Rose & Co.*]

DALDY & Co. AND OTHERS

v.

MIDLAND RAILWAY COMPANY,

GREAT EASTERN RAILWAY COMPANY

and

LONDON, TILBURY AND SOUTHBEND RAILWAY COMPANY (1).

Undue Preference—Rebate under Special Agreement—Publication of Rates in Rate Book under section 14 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48)—Railway and Canal Traffic Act, 1834 (17 & 18 Vict. c. 31), s. 2.

Section 14 of the Regulation of Railways Act, 1873, enacts, that "every railway company shall keep at each of their stations a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station to any place to which they book, including any rates charged under any special contract, and stating the distance from that station of every station, siding or place to which any such rate is charged."

February 27,
March 8, 19,
1900.

Section 13 of the Railway and Canal Traffic Act, 1888, enacts, that "in cases of undue preference no damages shall be awarded if the Commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section 14 of the Regulation of Railways Act, 1873."

The Midland railway company granted a rebate of 3*d.* per ton to traders who agreed to send a certain amount of coal traffic to Great Eastern stations in a year and pay for the carriage of the same punctually every month. In the rate books at various stations on the Midland railway company's line was inserted on the fly-leaf at the beginning of the book a printed slip stating that "rebates are allowed to coal merchants from certain rates to stations in the Eastern Counties and upon certain conditions, the particulars of which may be obtained on application to the general manager."

Held, that this general notice on the fly-leaf of the rate book was not a sufficient publication of a lower rate in the rate book to relieve the railway company from liability under section 13 of the Railway and Canal Traffic Act, 1888.

The applicants, who carried on the business of coal merchants at certain places situated on the system of the Great Eastern railway company, complained that the Midland railway company had allowed to certain coal merchants, who

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount CORHAM, sitting at the Royal Courts of Justice, London.

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were competitors in trade with the applicants, a rebate of 3*d.* per ton off the rates charged to such coal merchants for the carriage of coal from collieries situated on the system of the Midland railway company to stations situated on the railway of the Great Eastern railway company, but had not allowed the applicants such rebate off the rates charged to them for the carriage of coal from collieries situated on the railway of the Midland railway company to stations of the Great Eastern railway company, and the applicants alleged that thereby an undue preference had been given to the coal merchants to whom such rebate had been allowed over the applicants.

The Midland railway company admitted that they had allowed to certain coal merchants having coal depôts on the system of the Great Eastern railway company, in respect of coal coming from collieries on the system of the Midland railway company, a rebate of 3*d.* per ton off the rate charged for the carriage of coal, but the Midland railway company alleged that this was done only on condition that the coal merchants to whom such rebate was allowed sent in the course of a year from such collieries over the line of the Midland railway company not less than a specified number of tons of coal, and also rendered the Midland railway company certain services in paying carriage for such traffic, and that in consideration thereof the Midland railway company were justified in allowing such rebate.

Held, that such circumstances did not justify any greater difference of charge being made by the Midland railway company to the applicants and the other coal merchants than the sum of 1*d.* per ton.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854.

The application, so far as material, was as follows:—

“1. The applicants are coal merchants, whose chief place of business is at Romford in Essex, on the Great Eastern railway. They have also depôts or coal yards at stations on the Great Eastern railway.

“2. For ten years past and upwards the Midland company have carried for the applicants large quantities of coal from collieries situate on their system, and have delivered the same by their agents, the other respondent companies, at the stations situate on the lines of the other respondent companies.

“3. The rates charged by the Midland company for carriage of the coal from the particular colliery to the applicants' yards or other place of delivery have been paid by the applicants to the Midland company.

“4. The applicants have always paid to the Midland company, either directly or by their agents, the full amount of the published rate charged by that company for the carriage of coal

from the particular colliery to the station of delivery on the Great Eastern railway.

"5. For many years past—it is believed for the last twenty years—the Midland company have made to certain coal merchants a rebate or allowance of 3*d.* per ton in respect of coal carried for such merchants over the respondents' lines of railway to stations on the Great Eastern, while not allowing it to the applicants in respect of similar traffic carried by the Midland company, for them, and delivered in like manner.

"6. The existence of this rebate has, as far as possible, been kept secret by the Midland company, and the merchants enjoying the benefit of it. No notice of the rebate has been published either in the rate lists supplied from time to time by the Midland company to their customers, or in the rate books kept by them at their stations.

"7. The applicants first became aware of the existence of the rebate on March 3rd, 1898.

"8. The applicants allege that the disallowance of the said rebate to them and its allowance by the Midland company to other coal merchants constitutes an undue preference or advantage to or in favour of the merchants and persons to whom the same has been allowed, and subjects the applicants and the coal carried for them to an undue prejudice and disadvantage.

"9. The respondents, the Great Eastern railway company and the London, Tilbury and Southend railway company, are only joined as being parties to the through rates under which the coal carried by the Midland company from the said collieries is delivered by the respondents, the Great Eastern railway company and the London, Tilbury and Southend railway company, at stations on their lines respectively as agents for the Midland company.

"10. The applicants have suffered damage by reason of the Midland company having allowed the said rebate to other coal merchants while disallowing it to them, and they apply to the said Court—

- (a) For an order enjoining the Midland company to desist from subjecting the applicants and their traffic above

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mentioned to the undue and unreasonable prejudice and disadvantage above complained of, and from making and giving the undue and unreasonable preference and advantage above mentioned.

- (b) For an order that the Midland company shall pay to the applicants 1,500% damage, or such damages as on inquiry the Court may find that they have sustained."

The answer of the Midland railway company, so far as material, was as follows :—

"The Midland company admit that they have made to certain coal merchants a rebate, amounting sometimes (but not always) to threepence per ton, in respect of coal carried for such merchants over their lines of railway to stations on the Great Eastern and London Tilbury and Southend railways, but upon conditions so far as Great Eastern stations are concerned which did not apply to the traffic carried for the applicants which was not similar to that carried for the said coal merchants. The Midland company have always been ready and willing to make a similar rebate to the applicants for similar traffic upon the same conditions, and have in fact allowed to the applicants the rebate to London, Tilbury and Southend stations ever since it came into force.

"The Midland company deny that the allowance of this rebate has been kept secret by them, or that no notice of it has been published either in the rate lists or in the rate books kept by them at their stations.

"The Midland company deny that the applicants first became aware of the allowance of the rebate on March 3rd, 1898.

"The Midland company deny that the disallowance of the said rebate to them and its allowance by the Midland company to other coal merchants constitutes an undue preference or advantage to or in favour of the merchants and persons to whom the same has been allowed, or subjects the applicants and the coal carried for them to an undue prejudice and disadvantage.

"No complaint was made to the Commissioners within one year from the discovery by the applicants of the matter complained of.

"The rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the Midland company kept at their stations, in accordance with section 14 of the Regulation of Railways Act, 1873, as amended by the Railway and Canal Traffic Act, 1888."

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The agreement under which the rebate complained of was granted, was in the following terms :—

"Whereas the trader carries on the business of a coal merchant in the Eastern Counties of England, served by the Great Eastern railway and by the Eastern and Midlands railway, and for a long course of years a large proportion of the coal sold by the trader has been conveyed by the company from collieries upon or in direct connection with their system to Peterborough, or to Lynn, as the case may be, and has thence been conveyed forward by the Great Eastern railway company or by the Eastern and Midlands railway company to its destination at through rates, which are charged by and payable to the company. And whereas the course of business has been for the trader to pay the carriage upon coal sold by him whenever practicable, and he has paid such carriage direct to the company, who have accounted to the Great Eastern and Eastern and Midlands company respectively for their respective proportions. And whereas the payment of all carriage by the trader as aforesaid, instead of by the respective consignees of the coal, has been of advantage to the company, and in consideration thereof, and of the trader having directed a large share of the traffic which he could control over the Midland railway in preference to other railway routes, the company have made to the trader a rebate or allowance upon the amount payable by him for carriage as aforesaid. And whereas it is expedient that the terms and conditions upon which such rebate or allowance is made should be clearly stated; now it is agreed by and between the parties hereto as follows:—(1) When the company's route is equally convenient with that of any other company the trader will direct over that route a like proportion of his traffic to that which he has so directed upon the average of the three years

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ending 31st December, 1888. (2) The trader will, whenever it is conveniently practicable so to do, pay to the company the carriage upon all coal sold by him in the Eastern Counties. (3) The trader will pay to the company his accounts for carriage monthly at the times when such accounts shall be payable, according to the company's regulations from time to time in force, punctuality of payment being a material condition of this agreement. (4) The company will allow to the trader a rebate or allowance at the rate of 3*d.* per ton, calculated upon the total tonnage of coal upon which he shall pay carriage as aforesaid, provided that such total tonnage shall not be less than 25,000 tons in each year. (5) This agreement shall continue in force for a term of five years, and shall thereafter be determinable by either party at any time on giving three months' previous notice to the other party. Provided, that if a competent Court shall decide that this agreement constitutes an undue preference towards any other trader or class of traders, either party shall have the right to determine it forthwith."

C. A. Cripps, Q.C. (Noble and W. A. Wills with him), for the Midland railway company.

The Midland company have given a special rebate of 3*d.* to traders who have sent above 25,000 tons a year by their system to the Eastern Counties. They have always been ready to give the rebate to everyone who could comply with that condition. Such rebate is only a fair equivalent for the advantage to the railway company of dealing with such a large volume of traffic. The applicants never sent the requisite amount of traffic to obtain the rebate. Recently the railway company reduced the minimum amount from 25,000 tons of traffic a-year to 5,000 tons, owing to the new competition of the line which has been opened in connection with the Great Eastern railway to the Midland coal district. There is no undue preference when the railway company offer the same advantages to all persons similarly circumstanced. It has never been held to be an undue preference that a railway company do not give a proper notice in a rate book. That is only a question of whether the railway company have complied with the statutory conditions under the

Acts of 1873 and 1888. In granting a rebate the railway company are entitled to take into consideration the question of competition. *Pickering-Phipps v. London and North-Western Ry. Co.* ⁽¹⁾. A railway company may carry at a lower rate for traders who agree to send large quantities of merchandise when they send it in a manner which lessens the cost of its conveyance to the railway company, provided that the railway company are willing to carry at the same rate for any trader who can offer the same advantages.

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Ernest Moon for the applicants.

The mere volume of trade, as distinguished from economy of working, is not sufficient to justify any reduction of charge to the wholesale trader as against the retail. *Nicholson v. Great Western Ry. Co.* ⁽²⁾; *Rhymney Iron Co. v. Rhymney Ry. Co.* ⁽³⁾. The case of *Pickering-Phipps v. London & North-Western Ry. Co.* ⁽⁴⁾, has no application, because if there be competition between the Midland railway company and the sea, the competition affects both the applicants and the traders whom it is alleged are preferred. Competition may be considered as one of the circumstances justifying a *prima facie* preference if it exists in the one case and does not exist in the other, but cannot have any influence in deciding whether a preference is justifiable where the competition applies to both the preferred and complaining traders.

As to the question of economy by reason of there being an avoidance of bad debts and not so much book-keeping, it is not proved that there is a saving at all equivalent to the 3d.; and, further, it is not proved that the saving, if there be any, is referable to the volume of traffic which is made a condition of the granting of the rebate.

The fact that the same conditions are offered to everyone similarly circumstanced is no justification unless the railway company can show an equivalent economy in working. *Diphwys*

⁽¹⁾ *Ante*, Vol. VIII. 83; (1892) 2 Q. B. 229.

⁽²⁾ *Ante*, Vol. I. 121.

⁽³⁾ *Ante*, Vol. VI. 60.

⁽⁴⁾ *Ante*, Vol. VIII. 83.

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Casson Slate Co. v. Festiniog Ry. Co. ⁽¹⁾. The railway company have not complied with the provisions of section 14 of the Act of 1873 by merely putting a general notice in their rate books. They ought to have inserted the actual rebate allowed.

WRIGHT, J.: We have already intimated our opinion that the 13th section of the Act of 1888 has not been satisfied so as to relieve the railway company from liability on the ground of publication of a special rate in the rate book, and we have therefore to consider the matter at large. Here, I think, that in one sense there was no preference of the parties who carried under the agreement we have to consider, over the applicants, because I am satisfied that anyone who was willing to satisfy the same conditions could have obtained the benefit of the agreement, and that it was generally notorious in the district, and probably almost everyone knew of it, though I give entire credit to Mr. Daldy and those who represent him in saying that he happened not to know it. I think it was published, though in general terms, in the flyleaf at the beginning of the rate book at the station in such a way as would have informed most business men dealing with the subject that there was such an opportunity of an advantage, and of the way in which they could get it. I think, therefore, in that sense there was no preference of anyone over the applicants. But there is another sense in which there may have been, because the applicants may not have been ready to carry the quantity of coal, or conform to the other conditions, which alone would have enabled them to claim the benefit of that agreement, and, if they chose to carry their own coal in their own way without conforming to the conditions of that agreement, they are entitled to say that still no undue amount of preference must be shown to other traders who do conform to the agreement over themselves. And then remains the question whether the threepence here can be completely justified. I think it may be justified to some small extent on the ground of economy of working 25,000 tons for a trader, and to some small extent also because the bad debts

⁽¹⁾ *Ante*, Vol. II. 73.

were avoided and monthly payments were secured, and perhaps some other small advantage accrued; but I think we are all of opinion that the threepence considerably more than represents any benefit which could have accrued to the railway company on those grounds, and it remains to be considered whether any part of the threepence, and if so, how much, can be justified on what may be called grounds of competition. In substance, the argument of the railway company on that point is that the allowance of the threepence enabled them to get traffic which they would not have otherwise got, and in quantities in which they could not otherwise have got it. I think, especially after the case of *Pickering, Phipps & Co. v. The London and North-Western Ry. Co.* ⁽¹⁾, in which judgment was given by Lord Herschell, in the Court of Appeal, we are entitled to consider, if not bound to consider, any circumstances of that kind, and take into consideration elements of competition as far as they can be reasonably considered, and that the cases to which Mr. Moon has referred, if they exclude the consideration of those elements, must be taken not to be any longer binding. I do not say how far they do exclude them; in fact, I rather think they for the most part leave open that question, but at any rate in this case of *Pickering, Phipps & Co.*, it seems to me that these necessities of competition and advantages of offering a special rate for large quantities, which may be regarded as another form of competition, ought to be considered. In fact, I do not see how the every-day practice of all railway companies of giving special rates for large quantities could be defended on any other ground. It is undoubtedly greatly for the benefit, not only of the railway company, but of the traders. It is in the public interest, to use the words of the Act of Parliament, that such arrangements should be permitted. Therefore, I do not see any reason why some portion of the threepence, or the whole of it, should not, as far as the law is concerned, be held to be justified; but my brother Commissioners are of opinion that the amount is more than can be justified by that consideration. Of course, no difference of cost can be justified unless the

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⁽¹⁾ *Ante*, Vol. VIII. 83; (1892) 2 Q. B. 229.

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railway company were willing to offer the same advantage to everybody alike, nor can it be justified unless the difference against those who are not willing to perform the condition is a reasonable one. We think that, probably, it is rather more than a reasonable one.

As regards the general damages, those in a matter of this sort ought to be merely nominal. There is no evidence to show that Messrs. Daldy have really suffered any real damage by what has happened. As regards what may be called the statutory damages, we have had no application for leave to raise the defence of the Statute of Limitations, and probably the railway company do not care whether it is for six years, seven years, or eight years.

SIR FREDERICK PEEL: The Midland company agreed to return 3*d.* per ton out of their portion of a coal rate to such of the merchants, having depôts on the Great Eastern railway, as would cause not less than 25,000 tons a year to be sent to them *viâ* the Midland route. This was *prima facie* an undue prejudice to a merchant who sent a smaller quantity, because an inequality of charge, founded merely upon one dealer doing a larger business with a railway company than another, is not allowable under the Traffic Acts. To justify the larger dealer having a lower rate it must appear that there is a saving to the railway company in the carriage of his traffic, or something more than a mere quantitative difference to the company, more or less equivalent to the advantage they give to him. Where, as in the present case, the coal of the applicants, and the coal of those who were allowed the 3*d.* rebate, went in the same direction, and over the same distance, it would only be, we think, by some difference in the quantity forwarded at one time, that cost in working could be saved. But the dealers with whom the railway company had agreements were under no obligation to send in full train loads, or in not less than some specified large quantity at a time, and there can be no doubt that their wagons, and those of the applicants, were not infrequently sent on by the same trains, and with the same facility to the railway company, and that between their respective loads as to the cost

of carriage to Peterborough there was either no difference or none corresponding to a difference of 3*d.* on a charge of about 3*s.* 9*d.* per ton.

The Midland railway was in competition with other lines as a route for coal to Great Eastern stations, and one of the reasons for the rebate seems to have been that it might act as an inducement to give the Midland line the preference as a route for coal destined for places off that line. But the alternative routes were as much at the command of the applicants as of the other merchants, therefore, no distinction of terms could be made between them on this ground, the case differing in this respect from the *Pickering-Phipps Case* ⁽¹⁾ to which reference was made, where one only of two competing traders sending to the same market had a choice of routes to it.

The agreements specify as another condition of the rebate that the merchant shall pay the railway company monthly the carriage of all coal which he gets by means of their railway, and they say that the pecuniary advantage to them of this condition in dispensing with accounts with those to whom the coal is sold, is considerable. This may save the railway company some trouble and expense; but the mode of payment is that which the applicants themselves always used though not under agreement to do so.

On the whole we do not think we have evidence justifying the difference of charge, and we grant the application as to so much of the rebate as exceeds 1*d.* per ton.

LORD COBHAM concurred.

[Solicitors for the applicants: *A. H. Hunt & Co.*

Solicitors for the railway company: *Beale & Co.*]

⁽¹⁾ *Ante*, Vol. VIII. 83.

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APPEAL FROM RAILWAY COMMISSIONERS.

1. Where the Railway Commissioners sit in lieu of arbitrators under the provisions of section 8 of the Regulation of Railways Act, 1873, they exercise a jurisdiction not depending on the consent of the parties, and an appeal will lie under section 17 of the Railway and Canal Traffic Act, 1888, to a superior court on a question of law. (So held by the Court of Session.)

The Railway and Canal Traffic Act, 1888, section 17, enacts that "no appeal shall lie from the Commissioners on a question of fact . . . save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal."

Held (by the Court of Session), that an appeal is competent against an order of the Commissioners, if it appears from the judgment of the Commissioners (although not in the order itself) that in arriving at the result expressed in the order they had first decided a question of law.

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FACILITIES, DUE AND REASONABLE, FOR TRAFFIC.

1. *Passenger Station Accommodation—Rebuilding Bridge carrying Street over Railway—Alterations applied for not within Railway Company's own power.*

Section 16 of the Scotch Railway Clauses Act, 1845 (8 & 9 Vict. c. 33), gives power to a railway company (subject to restrictions in its special Act) to construct bridges over railroads, and from time to time to alter, repair or discontinue them and substitute others in their stead, and to do all other acts necessary for making, maintaining, altering or repairing, and using the railway.

Upon a complaint by the Town Council of Arbroath of the want of facilities for passenger traffic at the station at Arbroath, it was admitted that the rebuilding of a bridge on which the booking offices were erected and which carried one of the town streets over the railway, was essential to any material alteration and improvement of the station. This bridge was originally constructed by the railway company under their special Act, but the street passing over the bridge was vested in the municipal authorities of Arbroath.

Held, that while section 16 of the Railways Clauses Consolidation (Scotland) Act, 1845, gives railway companies power to alter works of their own, it does not apply to works which have been dedicated to a purpose other than railway purposes, *e.g.*, a street which is vested in the municipal authorities.

Held further, that as the accommodation works which the applicants asked for could not be carried out except with the consent or authority of someone other than the railway companies themselves, the works applied for were not within the railway companies' own powers, and that therefore the railway companies had not violated their statutory duty under section 2 of the Railway and Canal Traffic Act, 1854.

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2. *Facilities Clause—Diversion of Traffic—Interim Injunction—Powers granted under old Acts not exercised—Circumstances changed—Jurisdiction—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 9.*

Article 12 of an agreement made between the Great Northern railway company and the Manchester, Sheffield and Lincolnshire railway company, and dated 30th January, 1892, and confirmed by the Manchester, Sheffield and Lincolnshire Railway (Extension to London, &c.) Act, 1893, provided as follows:—

"On and from the passing of the bill, and whether the running powers provided for by this agreement are exercised or not, there shall be a complete system of through booking and through rates and fares between the systems of the two companies by all reasonable and convenient routes . . . and each company shall

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conduct the through traffic of the other company in good faith and by through trains, and shall afford to the other company all such reasonable facilities and accommodation as regards traffic of all kinds as is usual between friendly railway companies for the convenient conduct and exchange of traffic passing or destined to pass between the respective systems of the two companies."

The respondents having completed their line to London, certain fish traffic was handed to them at Grimsby for conveyance to London "*via* Great Northern railway." This had hitherto been so forwarded, but the respondents now conveyed it by their own route to London and delivered it themselves. On an application for an interim injunction enjoining the Great Central company to desist from diverting from the Great Northern company the fish traffic from Grimsby to London which is consigned by the Great Northern railway,

Held, that the route being *prima facie* a reasonable one, the Great Northern railway company would have *prima facie* the right of requiring traffic to be carried by it on reasonable terms; there being also *prima facie* a contract to that effect, and as an interim injunction would not harm the respondents (provided accounts were kept), and the absence of it might seriously damage the applicants, an interim injunction should be granted.

The Great Northern Railway (Communication with the Manchester, Sheffield and Lincolnshire Railway) Act, 1851, s. 14, enacted:—

"That the Great Northern railway company shall have the right of access at all reasonable and proper times to, and accommodation at, the tidal basin at Great Grimsby for the fish traffic, and likewise access to and accommodation at the docks for the goods traffic, including the right to rent a piece of land for warehouses thereat, upon such sites and upon such terms and conditions, and subject to such regulations as may be agreed upon by the engineers of the two companies, and in the event of a difference between them as may be settled by arbitration in the manner hereinafter provided."

Section 16 of the same Act provided for arbitration under the Companies Clauses Act, 1845.

The West Riding and Grimsby Railway (Transfer) Act, 1866, s. 31, enacted that:—

"It shall be lawful for the Great Northern railway company to run over and use with their engines, carriages, and servants the Sheffield, South Yorkshire, and Trent, Ancholme and Grimsby railways situate between Barnby Don and Grimsby, including the docks at Grimsby and the railways leading thereto and the works connected therewith, and to use in common with the said Sheffield and South Yorkshire, and Trent, Ancholme and Grimsby railway companies the several sidings, stations, turntables, docks and other conveniences and appurtenances to the said several lines of railway appertaining or belonging."

The applicants applied, under section 9 of the Railway and Canal Traffic Act, 1888, for an order enforcing the performance of the obligations imposed by the above-mentioned sections; also for an order, under section 8 of the Regulation of Railways Act, 1873, for determining the sites, terms, conditions and regulations upon which the rights conferred upon the applicants by section 14 of the Act of 1851 are to be exercised in lieu of arbitration. It was proved that the docks had been completely changed under powers given to the Manchester, Sheffield and Lincolnshire railway company by an Act of 1849, vesting the docks in them, and that the "tidal basin" no longer existed.

Held, by the Commissioners, that they had jurisdiction to deal with the above-mentioned matters under section 9, sub-section (a) of the Railway and Canal

FACILITIES FOR TRAFFIC—*continued.*

Traffic Act, 1888; and, with regard to the warehouse site, under sub-section (c) of the same section, where the term "individual" means "any legal person not the general public."

Quere whether, as regards section 14 of the Act of 1851, it is a condition precedent to the Commissioners having jurisdiction that the engineers of the two companies should have considered the matter and disagreed.

Held, further, that it is not the function of the Court to make abstract declarations which they could not enforce in their entirety; and that before making an effective order, or granting an injunction under the Act of 1851, the applicants must put forward a definite scheme to be considered by the respondents.

That the Great Northern railway company cannot now (1899) be considered in the same position as if they had asserted their rights immediately after the passing of the Act of 1851; and that they must now show that their scheme is reasonably possible.

Held, further, that section 31 of the Act of 1866 gives the applicants the right to run over and use the whole of the railways in the docks and all the appurtenances thereto, as the term "docks" in that section cannot reasonably be considered merely a definition of the *terminus ad quem*, but that the applicants must first show that the exercise of these powers of user can be so regulated as not to interfere with the convenient conduct of the business of the docks.

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INCREASE OF RATES,

1. *Increase of Coal Rates—Justification of Increase—Comparative Tables—Coal Wagons.*

Section 1, sub-section 1, of the Railway and Canal Traffic Act, 1894, enacts that: "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional Order confirmed by Act of Parliament."

Upon a complaint under the above section by colliery owners that, whereas the rates and charges made by the railway company for the conveyance of coal were, prior to the 1st of January, 1893, based and calculated upon the carriage of 21 cwt. to the ton, of which 1 cwt. was an allowance for "wastage," they were now based and calculated upon the carriage of 20½ cwt. to the ton, and that this admittedly resulted in an increase of 2½ per cent. upon the rate formerly charged to the applicants, and that such increase was unreasonable.

Held by COLLINS, J., and LORD COBHAM (SIR FREDERICK PERL dissenting) that the railway company having shown at least a proportional increase in the cost of working the traffic between the year 1877, when the original rates were fixed, and the year 1892, the increase of rate was reasonable; that the fact that

INCREASE OF RATES—*continued.*

since 1880 the railway company had supplied waggons for the mineral trade as carriers of minerals, for the use of which a separate rate was charged, did not necessitate the exclusion of this branch of their business from the general account (for purposes of comparison, in order to ascertain a reasonable conveyance rate), because the trader providing his own waggons was also benefited by the increased facility and greater economy with which the traffic was handled; and that the cost of providing relief men for mineral trains, which was necessitated by the shortened hours of labour and the fact that such trains had to stand on one side for goods and passenger trains, was an item properly attributable to the mineral traffic, which must be worked subject to the ordinary conditions on a highway.

Per SIR F. PERL: That this cost of providing relief men for mineral trains being a new expense, which, according to the railway company's tables of cost of locomotive power, mineral trains were able to be run without until 1889 or 1890, in so far as the extra men were required in consequence of the company running trains for various services and having to work them over the same line at different rates of speed, should be treated as a general charge, and be distributed over the entire traffic, and not laid on one branch of it only.

Held, by the Court, that a comparison of expenditure and receipts in any two years is a fair method of comparison where no special disturbing elements can be proved to exist. For a comparison based on train mileage to be of value, it must be shown that the conditions of working the traffic in the two compared years have remained substantially constant; which was not the case in the years 1877 and 1892, since in the latter year there was a larger proportion of long distance traffic, a mile of which brought in a smaller rate and was traversed at less cost than a mile of short distance traffic.

South Yorkshire Coal Owners Assurance Society v. Midland

Ry. Co. 28

2. *Indirect increase of Rates and Charges—Charge for Accommodation after Conveyance—Siding Rent.*

A railway company, being bound to give a reasonable time to the trader, after conveyance, to take delivery, prior to 1894 allowed the traders four clear days for that purpose, but calculated the four clear days not on one truck but upon the average time that all the trucks of a particular trader occupied the railway company's sidings. After 1894, they allowed four days exclusive of the day of arrival, but calculated the time allowed on each truck and not on the average. This was complained of as an indirect increase of rate, which the railway company were called upon to justify, under section 1 of the Railway and Canal Traffic Act, 1894. *Held*, that there was no indirect increase of the tonnage rate, because, under the former system, no particular ton of coal would have had greater accommodation as regards time than under the new system.

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3. *Indirect increase of Rates and Charges—Charge for Accommodation after Conveyance—Siding Rent—Liability as Carriers ceasing.*

Prior to February, 1895, the railway company's tonnage rates included the use of their sidings by the consignees (for coal trucks not belonging to the railway company) for an indefinite period. From the 1st of March, 1895, the railway company made a charge of 6d. per truck per day as "siding rent" after four clear days had been allowed for the discharge of the coal.

INCREASE OF RATES—*continued.*

The applicants contended that this was an "indirect increase of a rate or charge" within the meaning of section 1 of the Railway and Canal Traffic Act, 1894, and had to be justified by the railway company. They further contended that the proposed charge was "*ultra vires*" as being a general condition applicable to the rates and charges authorized by the Railway Companies' Rates, &c. Order Confirmation Act, 1892, and would require the sanction of Parliament.

Held, that the duty of a railway company as carriers ended after putting the merchandise in a position where the trader could take delivery, and leaving them there for such a reasonable time as would enable the trader, with ordinary appliances, to get his merchandise out of the truck. And that, although the convenience of the trader, since 1st March, 1895, had been curtailed, the four days was an attempt by the railway company to fix an extreme limit of time up to which they were content to bear the obligation of "carriers," and to deem it as covered by the conveyance rate; and that making a charge for something for which no charge had been made before (*viz.*, warehouse accommodation) did not constitute an increase, direct or indirect, of any rate or charge.

Held, further, that the charge was not "*ultra vires*," it being authorized by sub-section 4 of section 5 of the Railway Companies' Rates, &c. Order Confirmation Act, 1892, which gave the right to charge for "the detention of trucks or the use of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof."

Held, further, that the "*quantum*" to be paid by the trader to the railway company was a question expressly reserved for the consideration of an arbitrator and must be decided on the facts proved in each particular case.

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REBATE ON SIDINGS RATE.

1. *Onus of Proof—Evidence of Comparable Rates—Station Accommodation.*

The applicants claimed under section 4 of the Railway and Canal Traffic Act, 1854, to be entitled to a rebate on the rates charged to them by the railway company, on the ground that the railway company provided no station accommodation for the applicants' traffic. The applicants consigned salt from their private sidings for carriage over the respondents' railway, and it was admitted that the railway company did not provide any station accommodation or perform any terminal services. The railway company denied that the rates charged included a station terminal at the initial end. The applicants contended that a presumption was raised that they were charged an initial station terminal by showing—

- (1) that several of the through rates were above the maximum, unless they included two terminals;
- (2) that the rates from the nearest station, which was within one mile of the applicants' sidings, for class B articles (among which salt would be classed) were lower than the special salt rates from the sidings, although the former were station-to-station rates and at the railway company's risk, the latter being at the applicants' own risk.

It was admitted that no salt was in fact sent from the station, but only from the applicants' sidings.

Held, that there was no legal evidence that a second terminal was included in the special salt rates charged to the applicants, and that, where the rate was not above the maximum allowed for conveyance *plus* one terminal, the Court would not assume (in the absence of express evidence or admission) that an illegal and second terminal had been included in that rate.

Held, further, that express evidence ought to be given to show that the terminal was included, when the Court was asked to act on the view that it was so included.

Quære, whether a trader is not entitled to a rebate under the 4th section of the Railway and Canal Traffic Act, 1894, without reference to the question whether the second terminal is in fact included in a rate, although the rate may be within the maximum, where a comparable rate can be shown with reference to which the question can be raised.

Held (by the Court of Appeal), that an applicant under section 4 of the Railway and Canal Traffic Act, 1894, must make out a *prima facie* case in support of the application, and that the applicants, by merely proving that they were charged the rates, and that the siding did not belong to the railway company, had not made out a *prima facie* case that the rates included a charge for station accommodation so as to place upon the railway company the onus of proving that the rates did not include a charge for station accommodation.

Per A. L. SMITH, L.J.: The applicant must show that the rates charged to him include a charge for station accommodation or terminal services at the siding.

Per RIGBY, L.J., and VAUGHAN WILLIAMS, L.J.: The applicant may prove his claim to a rebate independently of whether he is charged for station accommodation or terminal services or not.

Salt Union, Limited v. North Staffordshire Ry. Co. (No. 1) . 179

2. *Station Accommodation and Terminal Services—Special Services at a Traders' Siding.*

The applicants were the owners of a siding situated immediately to the north of the goods station at Panmure on the joint line of the Caledonian and North

REBATE ON SIDINGS RATE—*continued.*

British railway companies, and about 73 chains from Carnoustie station and 56 chains from Barry station.

The applicants complained, under section 4 of the Railway and Canal Traffic Act, 1894, that they were charged terminals for traffic to and from their works at Panmure station, although the railway companies performed no terminal services and received and delivered the traffic on sidings not belonging to them.

The applicants' allegation that their rates included charges for station accommodation and for terminal services was based on the fact that the rates for similar traffic from the two nearest stations to Panmure, viz., Carnoustie and Barry (where there were no private sidings and no traders performing terminal services for themselves), were the same as those charged to the applicants, or differed in amount only in respect of difference of distance.

The railway companies contended that what was not a charge for conveyance in the applicants' siding rates was a charge, not by way of terminals, as in the rates with which they were compared, but for services at or in connection with the sidings, such as marshalling, labelling, clerkage, providing sheets, &c., and that it cost them as much to render those services as it did to do the work which was done at such places as Carnoustie and Barry, and for which, when done, so far as it was not incidental to conveyance, terminals were allowed them.

It was proved that whatever services the railway companies rendered at the applicants' private sidings at Panmure, they rendered also at or in connection with their own sidings at Carnoustie and Barry, and that there was nothing special or extra in them. And, further, that at Carnoustie and Barry they did a good deal besides, inasmuch as they provided a station and labour to load and cover.

Held, that the special services the applicants received at the hands of the railway companies were not a satisfactory reason for the same rates being charged at the applicants' private sidings at Panmure as were charged at Carnoustie and Barry, and that the applicants were entitled to have lower rates than the rates in force for similar traffic at Carnoustie and Barry. The extent to which they should be lower to be determined by the amount presumably charged for terminals at that end, ascertained on the principle adopted in *Pidecock's Case*, less the reasonable sum that might be found due to the railway companies for special services under section 5 of the schedule to the Rates, &c. Order Confirmation Act.

Where a railway company provide station accommodation, or perform terminal services, it is only reasonable to suppose that station and service terminals are equally with the charge for conveyance a component part of their rates.

Tennant & Co. v. Caledonian Ry. Co. and North British Ry. Co. 194

3. *Siding "not belonging to the Company"—Station Accommodation and Terminal Services—Clerkage—Signalling—Shunting—Unreasonable Delay in forwarding Trucks.*

If the mode in which a junction with the siding of a private owner has been effected is such that a railway company need incur no greater expense in connection with it than is involved in stopping a goods train specially at the siding junction, and either uncoupling trucks there and depositing them in the siding clear of the points, or drawing out trucks ready marshalled and attaching them to the train, doing no work within the siding, and being paid for any special use of levers by signalmen in a signal box, there is then a mere delivery for which no extra payment is due.

REBATE ON SIDINGS RATE—continued.

The applicants were the owners of a private siding near the Halstead station of the Colne Valley railway company. Partly from the siding having only one line for both outgoing and incoming trucks, and partly from its joining the main line at a very short distance from where that line crosses a street in Halstead, on the level, so bringing the case under the rules of the Board of Trade as to the shunting of trains over a level crossing, and engines standing across the same, it was not possible for a goods train to stop at the siding junction and for its engine to uncouple a truck and deposit it in the siding or to draw a truck out and unite it to the train. All trucks to or from the applicants' siding had to be taken into the goods yard at Halstead station and there prepared for despatch or delivery, a process which involved extra hauling and the provision of standing room.

In connection with the applicants' siding traffic the railway company had to specially provide points and signals, and the levers which worked them were only required for such traffic.

The railway company charged the applicants, on traffic to and from their siding, rates the same in amount as the rates charged as station to station, or collected and delivered rates, as the case might be, on similar traffic using the Halstead station.

Upon an application to the Commissioners under section 4 of the Railway and Canal Traffic Act, 1894, to determine what was a just and reasonable rebate to be made from the rates so charged to the applicants, the Court found that, in respect of the applicants' siding traffic, the Colne Valley and Halstead railway company did not provide the accommodation nor render the services, or any of them, for which station and service terminals were chargeable, but that they rendered certain other services in respect of that traffic, namely, some clerkage, shunting and signalling, for which a payment ought to be made to them. The Court held that a reasonable and just allowance or rebate to be made from the rates charged to the applicants, in the circumstances above described, would be so much of each rate as is not applicable to, or charged for, conveyance, less the following sums:—

- (1) A sum for clerkage equal to 30 per cent. of the charge the railway companies make in any rate as a station terminal at the Halstead end ;
- (2) A sum for shunting equal to the station terminal at the Halstead end ; and
- (3) In respect of the cost of signals, being a cost bearing the same proportion to the cost of all the signals in the siding signal box as the number of siding levers bears to the whole number of acting levers in that box, multiplied in each case by the average number of times they are respectively daily worked, such sum as the cost so ascertained works out at per ton of the siding traffic.

Portway v. Colne Valley and Halstead Ry. Co. and Great Eastern

Ry. Co. 211

RUNNING POWERS.

1. By an agreement entered into between the North-Eastern and North British railway companies, scheduled to an Act of Parliament, it was provided that "for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow and other places in Scotland, the North British company shall at all times hereafter permit the North-Eastern company, with their engines, &c., to run over and use the North

RUNNING POWERS—*continued.*

British company's railway between Berwick and Edinburgh subject to the payment by the company to the North British company for such user of such tolls, rates as have or has been, or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration."

The North-Eastern company applied to the Commissioners, under section 8 of the Regulation of Railways Act, 1873, for an order allowing them, in the exercise of their running powers, to run between Edinburgh and Berwick the full number of passenger trains required for the conveyance of passenger traffic between England and Scotland by the East Coast route. The Commissioners decided that the North-Eastern company were entitled to run one-half of the through passenger trains (for the conveyance of traffic between England and Scotland) over the railway of the North British company between Berwick and Edinburgh on the terms of the North-Eastern company paying to the North British company 75l. per cent. of the gross receipts, and retaining 25l. per cent. for working expenses, and that the payment of such 75l. per cent. by the North-Eastern company should include the payment by way of rent for station accommodation and station services at Edinburgh under the agreement.

Lord Trayner held that it was legally impossible to grant the application of the North-Eastern company in respect that the North British company, as owners of the line between Edinburgh and Berwick, were entitled as matter of legal right to run some, at least, of the through trains. On appeal.

Held (by the Court of Session), that the fact that the North British company were the owners of the line between Berwick and Edinburgh, did not of itself entitle them as of right, to run some of the through trains in dispute, and did not preclude the Railway Commissioners from granting, if they saw fit, the application of the North-Eastern company.

North Eastern Ry. Co. v. North British Ry. Co. 82

2. *Terms for exercise of—Allowance for Working Expenses—General Rule.*

The ordinary terms granted by the Railway Commissioners on which running powers may be exercised are 75 per cent. of the rate, after the deduction of terminals, to the owning company, and 25 per cent. of the rate to the company exercising the running powers.

This now amounts to a rule, which will only be departed from under special circumstances.

By an Act of Parliament the Caledonian railway company were given running powers over a line of the North British railway company to B., a distance of 13 miles, on such terms and conditions as should be agreed upon between these railway companies (subject to a provision that the rates charged by the Caledonian company to B. should not exceed those charged by them for similar traffic from the same places to G.), or as, failing agreement, an arbiter might determine.

Such arbiter was empowered, "in fixing such terms and conditions, to have regard to the obligations imposed on the Caledonian company with respect to rates."

The Caledonian company proposed certain fixed tolls for the exercise of their running powers, viz.: Passengers 2d. each, goods 4d. per ton, and minerals, including pig-iron, 3d. per ton; this being the arrangement between the two companies (by agreement) on the line to G., where the tolls in force, for a

RUNNING POWERS—continued.

distance of under three miles, were in each case less by 1d. than the above-mentioned proposed tolls.

Held, that the proposed tolls were inadequate, and that the running powers should be exercised on the ordinary terms.

Caledonian Ry. Co. v. North British Ry. Co. 259

SERVICES RENDERED AT OR IN CONNECTION WITH SIDINGS NOT BELONGING TO A RAILWAY COMPANY.

1. Reasonable Charge for Station Terminal—Railway Rates and Charges (No. 12)

Order Confirmation Act, 1892, s. 5 of the Schedule.

Held, that the tonnage rate authorized by section 2 of the schedule to the Railway Rates and Charges Order Confirmation Act, 1892, is for conveyance by merchandise train and any work incidental to such conveyance, and for the performance of which it is reasonable to use the train engine (*e.g.*, when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require); but that conveyance other than this off the main line does not come within section 2.

Held, further, that a station terminal is for use of the accommodation or staff of a terminal station after conveyance is at an end; and goods arriving at a station to which they are consigned for delivery, and which upon arrival have to be hauled a greater or less distance to be in a position where they can be unloaded and delivery given, are liable to a terminal charge.

The respondents were the owners of a siding which had been held to be a siding not belonging to the railway company. The siding had no direct connection with the up and down main lines, being separated from them by the railway company's goods yard at Retford station. Traffic, therefore, to and from the siding had to pass over the station sidings, and the service of taking it across was done by the railway company. This service was claimed to be one performed "at or in connection with" the traders' siding; and the railway company asked to be allowed to charge for it the same sum that they charged as a station terminal to traders who came under section 3 of the schedule.

Held, that such service might be charged for under section 5 of the schedule, even though it was a service which was involved in delivery, and which the trader could not himself perform.

Held, further, that the railway company being relieved, by the provision of the siding, from the expense of finding standing room for trucks and space for loading and unloading, that three-fourths of the sum which they charged as a station terminal at their Retford station, in respect of merchandise similar to the respondents' and liable to such terminal charge, was a reasonable sum to be charged to the respondents for services rendered by the railway company at or in connection with the respondents' siding at Retford.

Manchester, Sheffield and Lincolnshire Ry. Co. v. Pidcock & Co. . . 150

2. Shunting—Signalling—Cost of erecting Signal Cabins and Signals at junction with private Sidings—Railway Rates and Charges (No. 17) Order Confirmation Act, 1892, ss. 5 and 7 of the schedule.

A railway company cannot charge beyond the conveyance rate for anything done on their own lines which is properly incidental to conveyance or collection

SERVICES RENDERED, &c.—*continued.*

of traffic to or from private sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect.

But a railway company may be entitled to make a service charge if they are required for the convenience of the siding owner to do work on his siding, and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge.

Section 5 of the schedule to the North Staffordshire Railway Rates, &c. Order Confirmation Act, 1892, enacts that the railway company may charge in addition to the tonnage rate a reasonable sum for certain services rendered to a trader at his request or for his convenience, including (*inter alia*) services rendered by the company at or in connection with sidings not belonging to the company and the collection or delivery of merchandise outside the terminal station.

Under this section the railway company claimed payment for shunting services performed by them in respect of the Salt Union traffic to or from their sidings at Malkins Bank and Wheelock respectively. The traffic was salt outwards and coal inwards; and it was proved that as the works at Malkins Bank were in three sets or separate parts, and there were several points at which they communicated by sidings with the railway, the business of delivering full coal trucks and collecting loaded salt vans, and of bringing back and taking away empties, was considerable. The Salt Union sent a man to meet each train as it arrived, and he pointed out the particular sidings into which he desired trucks inwards to be put, or in which there were loaded salt vans to be hauled out. The railway company calculated that the time their goods trains were detained while the train engine was occupied in uncoupling trucks intended for delivery at the junctions, and in picking up trucks ready to go in the direction in which the train was travelling, averaged per diem at Wheelock one hour, and at Malkins Bank one hour and some minutes.

Held, that if the time occupied by the railway company's engine at the Salt Union's request or for their convenience in shunting the Salt Union's traffic to or from their Malkins Bank sidings exceeds for each train twelve minutes, and to or from Wheelock sidings exceeds six minutes, that the railway company may charge the Salt Union for time over the said twelve minutes and six minutes respectively during which the railway company's engine is occupied in shunting such traffic at the rate of 7s. per hour.

The railway company maintained a small staff at Malkins Bank to look after the siding traffic, and to superintend the working of it to and from the main line. The traffic was partly Salt Union and partly that of another firm of traders, and the railway company claimed that the expense, which was about 100*l.* a year, should be borne by the two firms in the proportion of the tonnage dealt with.

Held, that as the service the staff performed was a necessary one, and of a sort for which when done at a station a charge in addition to the tonnage rate would be allowed, the railway company were entitled to be paid by the Salt Union the expense they claimed from them.

By section 7 of the schedule to the North Staffordshire Rates, &c. Order Confirmation Act, 1892, it is provided that "nothing herein contained shall prevent the company from making and receiving in addition to the charges specified in

SERVICES RENDERED, &c.—continued.

this schedule, charges and payments by way of rent or otherwise for sidings or other structural accommodation provided or to be provided for the private use of traders and not required by the company for dealing with the traffic for the purposes of conveyance, provided that the amount of such charges or payments is fixed by an agreement in writing signed by the trader or by some person duly authorized on his behalf, or determined in case of difference by an arbitrator to be appointed by the Board of Trade."

The premises of the Salt Union, Limited, are connected at Malkins Bank and Wheelock with the railway of the North Staffordshire railway company by means of sidings not belonging to the railway company. The railway company claimed to charge the Salt Union under the above enactment by way of rent or otherwise for the erection of signal cabins, signals and other structural appliances for the private use of the Salt Union at Malkins Bank and Wheelock. It appeared that at the time the Salt Union made their junctions, and for long after, the branch railway on which they were situated was only a goods and mineral line. In 1893 the railway company converted such branch into a passenger line, and the works in question were provided by them to meet the Board of Trade requirement that home and distant signals should be provided at siding junctions before a railway company are allowed to carry passengers.

Held, that the railway company could not recover from the Salt Union the expense of providing such signals at Malkins Bank and Wheelock, they having incurred such expense solely to satisfy the Board of Trade that the line might with safety be used as a passenger line, and to obtain the Board's sanction to their acting as carriers of passengers, and not for the purpose of facilitating siding traffic, but to benefit the railway company themselves and the public.

Held, further, that such signals were not within section 7, not being works provided for the trader's private use, and "not required by the company for dealing with the traffic for the purpose of conveyance."

Seemle, that such works belong to the railway and are charged for in the rate for conveyance, as part of that rate is for "the use of the railway."

The railway company also claimed under section 5 of the schedule to their Rates, &c. Order Confirmation Act, to be repaid the cost of working such signals in connection with the Salt Union sidings.

Held, that the reasons stated by the Court for not allowing a charge to be made for the cost of providing the signals extended to the working of them, but that if the Salt Union paid anything for signalling or signalmen before 1893 (when the railway was converted into a passenger line), they should continue to do the same for the time since.

North Staffordshire Ry. Co. v. Salt Union, Limited . . . 161

3. Reasonable Charge for Haulage—Sheeting—Marshalling—Time occupied by engine in shunting operations at siding—Railway Rates and Charges (No. 25) Order Confirmation Act, 1892—Rebate on sidings rate.

The railway company claimed to be entitled under section 5 of the schedule to their Railway Rates and Charges (No. 25) Order Confirmation Act, 1892, to charge Messrs. Cowan a reasonable sum by way of addition to the tonnage rate for conveyance for services rendered by them to Messrs. Cowan at their request or for their convenience at or in connection with Messrs. Cowan's Low Mill siding at Penicuik, and at or in connection with sidings not belonging to the railway company at Granton harbour and Leith harbour, but running into and connecting with their Granton station and their Leith goods station.

SERVICES RENDERED, &c.—*continued.*

Messrs. Cowan sent esparto grass in bales from Granton harbour and Leith harbour to their mills at Penicuik, connected by private sidings with the company's railway, the Low Mill siding where the esparto was delivered being about sixteen miles from the Leith and Granton stations. The rate charged was 5s. a ton, and the maximum charge for conveyance for that distance being 3s. 1d., the balance of the rate, viz. 1s. 11d., was the charge for services other than conveyance. These services were (1) haulage over the harbour lines; (2) use of Granton or Leith Docks station; and (3) services at the Low Mill siding.

(1) As to the first of these services it was proved that when a vessel arrived at the docks the esparto was loaded direct from it into the railway trucks by men employed and paid by the consignees, but the sheeting of the trucks was done by the railway company, and also the haulage of them by engine and horse-power over the harbour lines to their goods stations at Granton and Leith. The charge for this service was 6d. a ton. In this charge was included 1½d. per ton for the sheeting, being the full service terminal, and 1d. per ton for the supply of straw and the laying it in trucks to prevent injury to the esparto from dust and damp. The railway company alleged that as there was no obligation on a railway company to perform services outside its own line, the haulage they did on the harbour lines, which were not theirs, was not a service within section 5 of their Rates and Charges Act, 1892, and that they might charge what they pleased for doing it.

Held, that such service was within section 5, such haulage being not more either of an outside or a voluntary service than cartage or collection and delivery; and the haulage being a service at or in connection with a siding, it did not affect the question that the railway company might decline to perform it if they considered it unremunerative at the price fixed.

Held, further, that 6d. per ton was a reasonable sum to be charged by the railway company to Messrs. Cowan for the haulage of trucks over the harbour sidings at Granton and Leith harbours to the railway company's goods stations at Granton and Leith, and the sheeting of such trucks, and the supply and laying of straw in such trucks in respect of esparto traffic to their sidings at Penicuik.

(2) As to the second of these services, it was proved that after the trucks had been loaded and brought into the Granton or Leith station they had, before being sent away, to be made up into a train with other trucks, and the marshalling of them for that purpose constituted the entire service rendered within the station in connection with the harbour lines. For such work the company claimed to charge 13½d. a ton, or three-fourths of their maximum station terminal.

Held, that marshalling after loading and before conveyance was one of the duties for which provision was made in the station terminal, and that some proportion of that terminal would be the payment for it. And that a sum not exceeding 9d. per ton would be a reasonable sum to be charged by the railway company to Messrs. Cowan for what was done by them in dealing with Messrs. Cowan's traffic at the company's goods stations at Granton or Leith.

(3) As to the third of these services being a service performed by the railway company in respect of the delivery of Messrs. Cowan's traffic to their Low Mill siding, the junction with which was within a quarter of a mile of the Penicuik station, it was proved that esparto or other traffic arrived at this siding daily by one or more trains, and that the average number of trucks left per train was about seven; and that the goods engine drew up as it approached the junction, and its engine put into the siding the trucks that were destined for it; and in

SERVICES RENDERED, &c.—*continued.*

addition to putting them clear of the main line, it put them into whichever set of rails near the points it was convenient to Messrs. Cowan to have them. A note was then taken of the number and contents of each truck by a checker employed by the railway company. For esparto thus delivered the railway company's charge was 3½d. per ton, and this they contended was not more than the cost of the extra time their engine and men were employed, distributed over the tonnage carried, came to per ton. This extra time they reckoned at fifteen minutes per train, but it was proved that the actual length of the stops did not average four minutes, leaving eleven minutes for time lost or reduced speed before and after stopping.

Held, that a railway company were not entitled to make a special charge for time occupied in the stopping and again starting of a train, for it was part of the service of delivery, which was provided for in the rate for conveyance; nor on the same ground could they make a special charge for so much of the actual time the train was at a standstill as it took to uncouple and put trucks past the points.

Held, further, that if the time a train was detained at Low Mill siding (while its engine was occupied in shunting Messrs. Cowan's traffic) exceeded four minutes, that the railway company would be entitled to charge Messrs. Cowan for time over the said four minutes during which the railway company's engine was occupied in shunting such traffic at the rate of 7s. an hour.

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SIDING RENT,

1. *Reasonable Sum—Reasonable Time for Unloading—When commences to Run—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, Schedule, sections 5, 25.*

The Midland Railway Company's Rates, &c. Order Confirmation Act, 1891, section 5 of the schedule, provides that they may charge a reasonable sum by way of addition to the tonnage rate for certain services rendered to a trader at his request or for his convenience, including (*inter alia*) the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the consignee to take delivery of the merchandise, and for services rendered in connection with such use and occupation.

The Midland railway company claimed under this section the sum of 6d. per truck per day, as siding rent, at Sheffield, after the expiration of four clear days allowed for unloading.

Held, that 6d. per truck per day was a reasonable sum to apply to all traders at Sheffield and similar places, though it would not necessarily apply to other places, *e. g.*, rural stations, where the cost of the construction of sidings might be less, and the cost of working might be more, in proportion to the quantity of traffic; and where the loss of business by the blocking of the siding might be greater or less according to circumstances.

That in ascertaining the "reasonable sum" to be charged under this section the cost of maintenance should only be considered where it exceeds that which would be incurred if delivery were taken within the four days, and only those services in excess of those which would be otherwise performed are to be taken

SIDING RENT—*continued.*

into consideration. Likewise the cost of accommodation is only a factor in cases where extra accommodation has to be provided owing to the trader's habitual delay in unloading.

Held, further, that four days, exclusive of the day on which the notice of arrival was given, was a reasonable period for unloading; that although, *prima facie*, this time would not begin to run until the trucks were in the siding, handed over to the trader, ready for unloading; yet if the trader were not ready to take delivery, the siding being blocked by him, the time ran from the moment the railway company were ready to send the trucks to the siding; while, if the railway company were in default, the trader would have his remedy under the contract for delivery.

Held, further, that the contention that when the railway company got the benefit of the expedition of traders in ninety per cent. of the traffic, which was unloaded within the four days, there should be some "set-off" to the traders as regards traffic detained after the four days, was untenable; since the period of four days was not a matter of right, and the character of the railway company would change after the four days had expired from that of a "carrier" to that of a "bailee"; and that therefore the Court would not compel the railway company, directly or indirectly, to give the traders the benefit of a former system of "averaging" the number of days.

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SIDINGS. See *Rebate on Sidings Rate* and *Services rendered at or in connection with Sidings*.

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36 & 37 Vict. c. 48 (Regulation of Railways Act, 1873),
s. 8 82, 259
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46 & 47 Vict. c. 34 (Cheap Trains Act, 1883),
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51 & 52 Vict. c. 25 (Railway and Canal Traffic Act, 1888),
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57 & 58 Vict. c. 54 (Railway and Canal Traffic Act, 1894),	
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TELEGRAPH ACTS,

1. *Telephone Wires—Conditional consent of Road Authority—Objections they may take.*

The Corporation of London (as successors of the Commissioners of Sewers of the City of London) on being applied to by the Postmaster-General under section 3 of the Telegraph Act, 1878, for their consent to the placing and maintaining of a line or lines of underground telegraphs under certain streets in the City of London, refused their consent, except on condition that the said line or lines of telegraphs should not be "laid for the use of the National Telephone company, unless the telephone company were prepared to provide an improved service at a reduced cost." This difference, after having been referred to the Judge of the City of London Court, was, in accordance with section 4 of the Telegraph Act, 1878, brought before the Railway Commissioners.

Held, that the following words in section 5 of the Telegraph Act, 1863—"any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) as the person or body giving consent thinks fit"—only entitled street authorities in withholding such consent to raise objections of a kind which concerned them as a street authority; and that the objection raised by the corporation was an unreasonable one, inasmuch as it did not apply to the public at large and did not affect the corporation's interests as a street authority at all.

Postmaster-General v. Corporation of London 234

2. *Telephone Wires—Conditional Consent of Road Authority—Public Interest—Pecuniary Terms.*

The Corporation of Glasgow refused their consent to the laying of wires by the Postmaster-General except on the condition "that such consent was not to be made applicable to the purposes of any private company or individual, whose application if made direct to the corporation could be refused by the corporation without right of appeal."

The Postmaster-General admitted that the wires when laid would be used by the National Telephone company as junction lines with the Post Office trunk lines, and stated that this would be done in pursuance of a Treasury Minute which had been laid before Parliament.

Held, that the Postmaster-General was carrying out a definite policy sanctioned by the legislature, and must be assumed to be acting in the public interest in providing facilities for the telephone company; and that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorized by the law.

Held, further, that the Commissioners under section 3 of the Telegraph Act, 1878, as "the authority by whom the difference is to be determined, may . . . give their consent either unconditionally or subject to such pecuniary or other terms, conditions and stipulations as they may think just," and therefore may fix pecuniary terms where such terms are no part of the original difference.

The Corporation of Glasgow appealed to the Court of Session under section 17 of the Railway and Canal Traffic Act, 1888, on the ground that the words in the

TELEGRAPH ACTS—continued.

judgment "that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorized by the law," were founded upon an erroneous view of the law, and that this had prevented the Commissioners from considering the reasonableness of the conditions which the corporation sought to have attached to their consent.

Held (by the Court of Session), that these words did not decide any question of legal right, but merely expressed the view of the Court that the condition was an unreasonable one; and, there being no question of law, that the appeal was incompetent.

Postmaster-General v. Corporation of Glasgow 238

3. *Telephone Wires—Ownership of "solum" by Road Authority—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 13—Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 5.*

The powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, are powers of construction, and a licence granted by him to the National Telephone company to use lines when constructed is not a licence to exercise powers conferred on the Postmaster-General by the Telegraph Acts of 1863 or 1878; and, consequently, in such a case, section 5 of the Telegraph Act, 1892, has no application.

Section 13 of the Telegraph Act, 1863, only requires the consent of the landowner (to the laying of telegraph wires) in addition to the consent of the body having control of the street, where such landowner is liable, *quod* landowner, for the repair of the street, and where the landowner and the body having such control are separate persons.

The fact of a corporation having the ownership of the *solum* through which the wires are to be laid, affords no reason for annexing pecuniary terms to their consent, inasmuch as the corporation is a public body, and the Postmaster-General must be held to be acting in the public interest.

Postmaster-General v. Corporation of Edinburgh 247

TELEPHONE WIRES. See *Telegraph Acts*.

TERMINAL CHARGES. See *Rebate on Sidings Rate*.

TERMINAL SERVICES. See *Rebate on Sidings Rate*.

THROUGH BOOKING.

1. An order by the Railway Commissioners for through booking is not a matter of right.

Such an order necessarily involves an order for a through rate, although the through rate may be only the sum of the local rates of the several lines over which the traffic passes. Consequently an order for through booking can only be granted on the same considerations as would govern the granting of a through rate (*per* LORD Esher, M.R., and RIGHT, L.J.; LOPES, L.J., dissenting).

Through booking may be granted without a through rate, not as a matter of right, but upon evidence that it is a reasonable facility within the meaning of section 2 of the Railway and Canal Traffic Act, 1854 (*per* LOPES, L.J.).

Didcot, Newbury & Southampton Ry. Co. v. Great Western Ry. Co. and London & South-Western Ry. Co. 1

THROUGH BOOKING—*continued.*

2. Under section 2 of the Railway and Canal Traffic Act, 1854, the Railway Commissioners have power (upon proof that it is reasonable and in the interests of the public) to order through booking of both passengers and goods at the sum of the local rates charged on the two lines of railway constituting the through route (*per* COLLINS, J.).

If the demand for such through booking is made *bond fide* by a member of the public, and *a fortiori* by a community, there is *ipso facto* a strong *prima facie* case of reasonableness and public interest (*per* COLLINS, J.).

Didcot, Newbury & Southampton Ry. Co. v. London & South-Western Ry. Co. and Others (No. 2) 9

THROUGH RATES,

1. *Grouping London Stations—Termini a quo and ad quem the same—Competitive Company not Grouping.*

In applications under section 25 of the Railway and Canal Traffic Act, 1889, the Commissioners require evidence of public interest and reasonableness in favour of the proposed through rate and route adequate to outweigh the interference with the vested legal rights of railway companies.

The Didcot railway company applied for through rates *via* their railway for traffic between Southampton and the Great Western company's stations in London at Poplar and Smithfield. The proposed route was that by which the Commissioners had already allowed through rates for traffic between Southampton and the Great Western station at Paddington (see *ante*, Vol. ix., p. 210).

The difference between that case and the present one was that in the former case traffic coming to Paddington could only be offered to the Great Western company, whereas traffic coming to Poplar or Smithfield might also be offered to the South-Western company for that railway company equally with the Great Western company received and delivered traffic at both of those places.

Poplar traffic for either the South-Western railway or the Great Western railway passed over the North London railway, and for haulage between Poplar and Acton (Great Western) and Poplar and Kew Bridge (South-Western) each railway company paid a toll of 3*s.* 3*d.* a ton. To provide for this payment the South-Western company's rates by rail from Poplar to Southampton were higher than from Nine Elms. The Didcot company proposed that the through rates from Poplar to Southampton *via* the Great Western and Didcot railways should be the same as were charged from Paddington, on the ground that the Great Western had made their local rates from Paddington applicable to Poplar, Smithfield, and their other London stations.

Smithfield traffic for the Great Western company was carried by that company over the Metropolitan railway under running powers at a cost of 10*d.* a ton for the use of the line. The South-Western company had a receiving office at Smithfield, and carted all their traffic to and from Nine Elms. The Didcot company proposed that the through rates from Smithfield as compared with those from Paddington should be 10*d.* more for Classes A. and B. and for certain articles carried at special rates, and for all other traffic should be of the same amount.

The Applicants' proposal was not only to convey traffic to and from Paddington by a route belonging to three different railway companies and sixteen miles longer than the South-Western route, at the Nine Elms rates (which were admittedly low on account of sea competition), but to carry the traffic to and from Smithfield and Poplar four and ten miles further respectively at the same rates.

THROUGH RATES—*continued.*

Held, that the through rates for traffic from Poplar to Southampton *via* the Great Western and Didcot railways should be of the same amount as the existing South-Western rates between those places.

And that the through rates for traffic from Smithfield to Southampton *via* the Great Western and Didcot railways should be of the same amount as the rates from Paddington, plus the cost of the conveyance of the traffic between Smithfield and Paddington.

Didcot, Newbury & Southampton Ry. Co. v. London & South-Western Ry. Co. and Others (No. 2) 9

2. *Right to apply for Exceptional Rates.*

A canal company authorised by Act of Parliament to construct railways on their quays and land, and to charge reasonable tolls and charges for the use of the same within a maximum fixed by their Railway Charges Confirmation Act, 1893, although they are under no obligation to admit the public as carriers upon their lines under the Railway Clauses Act, 1845, are a "railway company" within the meaning of the Railway and Canal Traffic Act, 1888, and, whether express powers of carrying upon their lines have been given them or not, are competent to propose through rates under the 25th section of that Act.

When a railway company has agreed rates from a port to inland towns with other companies in their joint interest, such rates should not be treated as local rates of that company, so as to compel them to carry to the common point from another port at rates equal, distance for distance, to such agreed rates.

Manchester Ship Canal Co. v. Midland Ry. Co. 54

3. *Reasonable in the Interests of the Public—Comparison of Through Rates over Routes composed of the Lines of different Railway Companies.*

In allowing or fixing through rates the Railway Commissioners will consider all the circumstances of the case, and one of the circumstances is, what powers the particular railway companies whose lines are part of the through route have of demanding rates.

On an application to allow a through rate, it was proved that there was in existence a rate arranged between the parties which was virtually a through rate, and which rate was much lower than the sum of the local rates over the lines which constituted the through route. The through rate applied for involved a still further reduction of about 6d.

Held, that under these circumstances the onus was upon the applicants to prove that the through rate which they proposed was a just and reasonable rate.

The proposed rate was over a route composed of three lines, which carried for about six, forty-five and twenty-five miles respectively of the route. It was proved that there was an alternative route which was composed of two lines, and which passed for the same short distance of six miles over the line, which was common to both routes, and the entire residue of seventy-five miles over that of another company, and that there was an existing rate by the alternative route of 6d. less than the existing rate over the route for which a through rate was proposed.

Held, that it did not follow, that because the rate over the alternative route was reasonable, and was smaller in amount for a slightly longer distance, that

THROUGH RATES—continued.

the existing rate over the route composed of three railways, five miles shorter, and which was 6d. higher, was unreasonable.

Birmingham Corporation and Sheffield Coal Co., Limited, v.

Manchester, Sheffield & Lincolnshire Ry. Co., Midland Ry.

Co., and London & North-Western Ry. Co. 62

4. Through Rates for Goods—Reasonable Route—Point of Exchange—Sending Company's Claim to Long Run.

On an application for through rates, the fact that the station where it is proposed to exchange the traffic is not, in any reasonable sense, a practicable one for that purpose will go to show that the proposed route is not a reasonable route within the meaning of section 25, sub-section 5, of the Railway and Canal Traffic Act, 1888.

The Court will consider not only the public interest in a competitive route, but also the right of a railway company to a long run in respect of traffic originating on its own system.

The Plymouth company applied, under section 25 of the Railway and Canal Traffic Act, 1888, for an order allowing through rates for goods traffic between the South-Western termini in London (Nine Elms and Waterloo) and Truro, Penzance and other stations on the Great Western railway in Cornwall, by way of Lidford and Plymouth North Road.

The applicants' line was a double line twenty-two miles in length, which ran from Lidford (where it joined the South-Western company's main line) to that company's station at Devonport, and was worked by the South-Western company. From Devonport the South-Western company owned a junction line with the Great Western main line (from London to Cornwall), and they had running powers over the latter to the Plymouth North Road station. The proposed exchange of traffic between the two companies was to take place at Plymouth North Road station.

Held, that the proposed route with an exchange at Plymouth North Road station was not a reasonable route.

Plymouth, Devonport & South-Western Junction Ry. Co. v. Great

Western Ry. Co. and London & South-Western Ry. Co. . . . 68

THROUGH ROUTE. See *Through Rates*.

TONNAGE RATES, what services the payment includes 150

TRADERS' WAGONS,

Traders' Salt Wagons—Railway Company exempted from providing them—

Maximum Rates, including the provision of trucks by the Railway Company—Amount of Rebate—Railway Rates and Charges (No. 17) (North Staffordshire Railway, &c.) Order Confirmation Act, 1892, s. 2 of the schedule.

Section 2 of the schedule to the North Staffordshire Railway Company's Order Confirmation Act, 1892, enacts, that "the maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise trains; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. Provided that—(a) . . . the company shall not be required to